

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

143

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA ~~CIRCUIT~~ of Appeals
for the District of Columbia Circuit

No. 24,446 **FILED** SEP 3 1970

Nathan J. Paulson
NORMAN F. HECHT, et al. ~~CLERK~~
Plaintiffs,

v.

PRO-FOOTBALL, INC., et al.,
Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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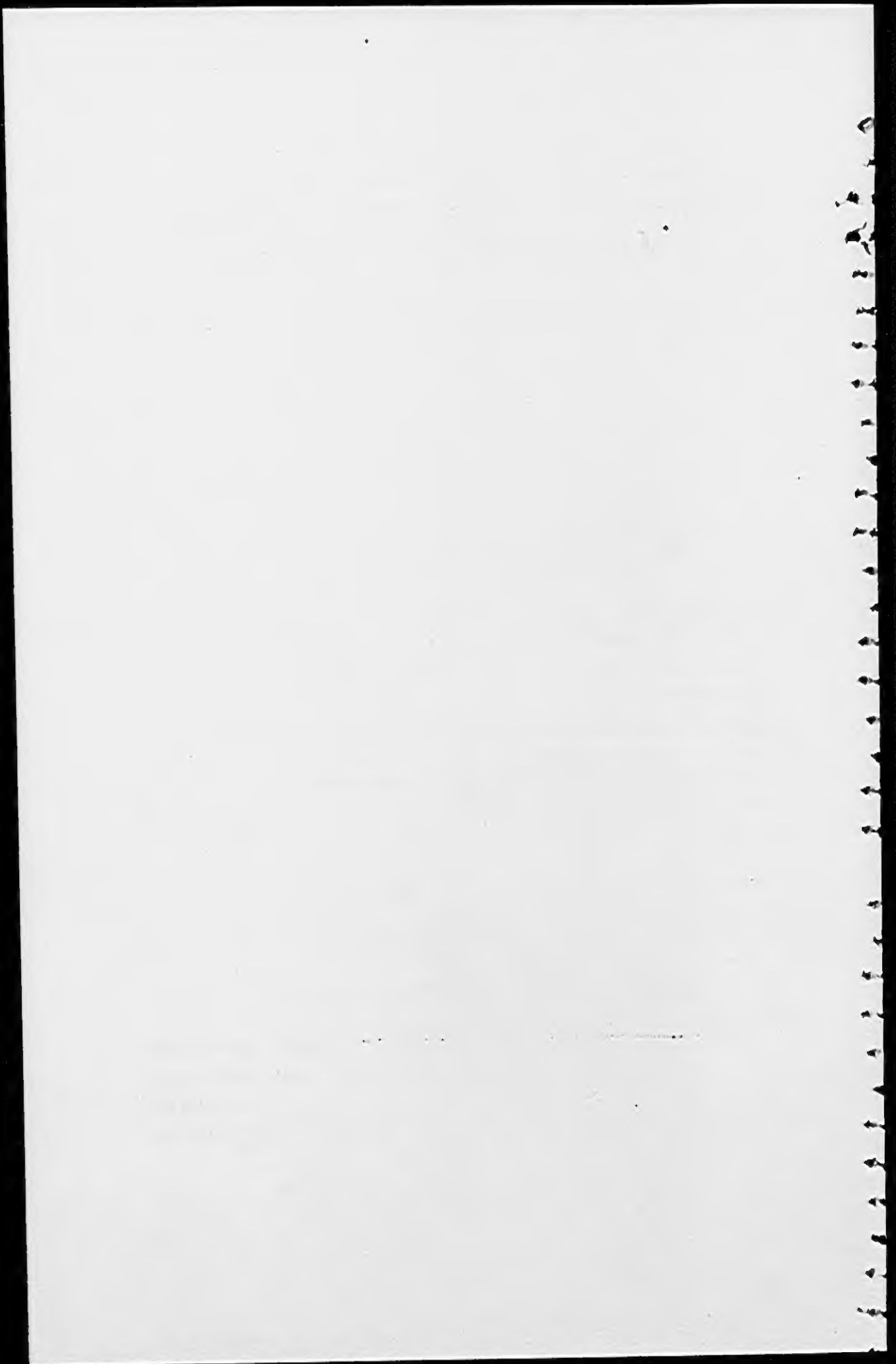
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STATEMENT OF THE ISSUE *

Whether the District Court erred by failing to distinguish between those government actions that have immunity from the antitrust laws and those government actions that do not have immunity, in granting defendants' motion for

*This case has not previously been before this Court.

summary judgement on Counts I, II and III of the second amended complaint on the grounds that the restrictive covenant in the lease agreement between Pro-Football, Inc. and the D.C. Armory Board, which prohibits the use of Robert F. Kennedy Stadium by any professional football team other than the Washington Redskins for thirty years, is the product of valid government action and is immune from the antitrust laws.

REFERENCES TO RULINGS

This appeal is from the Order and Opinion of the District Court for the District of Columbia granting defendants motion for summary judgment with respect to Counts I, II and III of the second amended complaint, dated and filed April 16, 1970. *Norman F. Hecht v. Pro-Football, Inc.*, 312 F. Supp. 472 (D.C.D.C. 1970). (App. 22).

STATEMENT OF CASE

Appellants are three local businessmen,¹ who entered into a joint venture to engage in the business enterprise of promoting and obtaining an American Football League franchise or a Continental Football League franchise for Washington,

¹Appellants are hereinafter referred to collectively as the "joint venturers," consisting of Norman F. Hecht, who was manager of a branch of Public National Bank and is now President of American Investment Corporation, an investment and real estate management company in the Washington area; Harry Kagan, who is an owner and operator of a large volume downtown liquor store and is active in real estate investments; and Marc Miller, who was a part owner of a downtown restaurant and is now engaged in real estate development and investments.

D.C. The plaintiffs, United States Football League and Washington Federals, Inc., have not joined in this appeal.²

Appellee, Pro-Football, Inc.,³ owns and operates the professional football team named the Washington Redskins, which is the only professional football team that exhibits its home games in the District of Columbia. Appellee, National Football League, is an unincorporated association of owners of professional football teams of which Pro-Football, Inc. is a member. Appellee, District of Columbia Armory Board,⁴ is an unincorporated government instrumentality of the District of Columbia that maintains and operates Robert F. Kennedy Stadium,⁵ which is the only stadium in the District of Columbia designed, used, and and suitable for the exhibition of professional sport events.

This case involves the application of the prohibition against contracts in restraint of trade of Sections 1, 2 and 3 of the Sherman Act to the restrictive covenant in the Redskins' lease, which prohibits the use of Kennedy Stadium by any professional football team other than the Redskins for a period of thirty years.

The original complaint was filed on October 21, 1966 and the second amended complaint was filed on March 24, 1967. Count I of the second amended complaint alleges that the restrictive covenant, in the Redskins' lease on

²Although the decision of the Court, whether the restrictive covenant in the Redskins' lease is immune from the antitrust laws, will have a direct effect upon the present renewed efforts of the United States Football League and the Washington Federals, Inc. to form another major professional football league, they have decided not to participate further in this case, since a separate suit for injunctive relief would be more appropriate if they are again denied the use of Robert F. Kennedy Stadium because of the restrictive covenant in the Redskins' lease.

³Hereinafter referred to as the "Redskins."

⁴Hereinafter referred to as "Armory Board."

⁵Hereinafter referred to as "Kennedy Stadium" or the "Stadium."

Kennedy Stadium, constitutes a contract in restraint of the business of professional football in the District of Columbia, in violation of Sections 1 and 3 of the Sherman Act, because the restrictive covenant foreclosed the joint venturers from the use of a stadium facility essential to the operation of a professional football team in the District of Columbia, that had the effect of preventing the joint venturers from promoting and obtaining an American Football League or Continental Football League franchise for the District of Columbia.

Count II alleges that the Redskins are engaged in an attempt to monopolize and have monopolized the business of professional football in the District of Columbia, in violation of Sections 2 and 3 of the Sherman Act, which monopoly the Redskins have furthered and effectuated by obtaining the restrictive covenant and by not waiving it and consenting to the use of Kennedy Stadium by the plaintiffs on those Sundays and Friday, Saturday and Monday nights when the Redskins are not using it.

Count III alleges that the Redskins, National Football League, Milton W. King and Pete Rozelle have been and continue to be engaged in an unlawful combination and conspiracy to restrain and monopolize the business of professional football in the District of Columbia in violation of Sections 1, 2 and 3 of the Sherman Act, which combination and conspiracy, in part, has been furthered and effectuated by the restrictive covenant in the Redskins' lease. The second amended complaint was dismissed as to Milton W. King by Order of the Court dated May 13, 1968, and plaintiffs have been unable to obtain service of process on defendant Pete Rozelle.

Counts IV and V relate to the merger agreement between the National Football League and the American Football League and those counts were dismissed in a Consent Order dated June 17, 1970.

On November 20, 1967, all plaintiffs filed a motion for summary judgment on the issues of liability raised in

Counts I and II of the second amended complaint. On January 15, 1968, the defendants, Redskins, National Football League and Milton W. King, filed a motion for summary judgment on Counts I, II and III. The motions were heard by the late Judge Alexander Holzoff, who denied all motions on the grounds that there were too many issues of fact to be determined and the case should be tried.⁶

The defendants, Redskins and National Football League, joined by the Armory Board, filed their renewed motion for summary judgment on Counts I, II and III, and the joint venturers renewed their motion for summary judgment on Counts I and II on January 15, 1970. On April 16, 1970, Judge William B. Jones rendered an opinion and entered an order granting defendants' motion for summary judgment and denying plaintiffs' motion. Judge Jones reasoned that a long term lease with the Redskins was desirable to meet the financial obligations of constructing and operating the Stadium and to accomplish the purposes of the Act. "Thus, the leasing of the Stadium was pursuant to the mandate of the Act and was governmental action."⁷ By concluding that the leasing of the Stadium was a governmental act immune from the antitrust laws, Judge Jones erroneously extended the immunity of the "valid governmental action" doctrine to the restrictive covenants prohibiting the use of the Stadium by any professional football team other than the Redskins.

Plaintiffs bring this appeal on the grounds that the leasing of Kennedy Stadium by the Armory Board is not the kind of government action that is immune from the antitrust laws, by virtue of it not being the kind of government action that comes within the "valid governmental action" doctrine, and, therefore, the restrictive covenant in the Redskins' lease is not immune from the antitrust laws.

⁶Transcript of proceedings of May 7, 1968, pp. 65, 66, filed 7/13/70.

⁷App. 33.

Robert F. Kennedy Stadium

The Robert F. Kennedy Stadium is a government facility that was constructed and is maintained and operated by the District of Columbia Armory Board, pursuant to the District of Columbia Stadium Act of 1957, as amended, 2 D.C. Code, § 2-1720 (1967 ed.), and in accordance with the provisions of a thirty year contract between the Armory Board and the Director of the National Park Service, acting on behalf of the Secretary of the Department of Interior.⁸ The Stadium occupies land that is owned by the Federal government as part of its national park system and, pursuant to the Stadium Act, after a period of not more than 50 years, during which the stadium indebtedness is to be eliminated, all right, title and interest in and to the Stadium shall vest in the United States.

Since its opening, the Stadium has been operating at a loss, such loss being borne both by taxpayers of the District of Columbia and the United States.⁹ Each year the Government of the District of Columbia has been forced to borrow from the Treasury of the United States substantial sums of money (\$765, 000.00 in 1965 and \$831, 600.00 in 1966) in order to make interest payments on bonds floated to finance construction of the Stadium.¹⁰

Kennedy Stadium was constructed for the purpose of providing "the people of the District of Columbia with a stadium suitable for holding athletic events,"¹¹ and not for the exclusive use of any one particular tenant. Kennedy Stadium is the only stadium located in the District of Columbia which is designed, used and suitable for the exhibition of professional major league sports events. It is the

⁸Contract No. 14-10-0100-1030, dated December 12, 1958.

⁹Hearings before Subcommittee of House Committee on Appropriations, 89th Cong., 1st Sess., Feb. 13, 1965, p. 735.

¹⁰Armory Board's Answers to Interrogatories, No. 7, filed 8/15/67.

¹¹2 D.C. Code, 2-1720 (1967 ed.)

only stadium in the District of Columbia that has a seating capacity of approximately 50,000 spectators, ample parking space, and a massive score board to report the progress of other league games. It is the only stadium in the District of Columbia where concession stands are permitted to sell beer. All other stadiums in the District of Columbia are high school stadiums which are totally unsuitable for professional football games. The stadium of Maryland University at College Park is not available for use by a professional football team for the exhibition of its regularly scheduled league games.¹²

Armory Board Operates Stadium As A Private Landlord

The District of Columbia Armory Board is composed of the Commissioner of the District of Columbia, the Commanding General of the District of Columbia Militia and a third person not employed by the Federal or District Governments, who is appointed by the Chairman of the District of Columbia Committees of the United States Senate and the United States House of Representatives for a term of three years.¹³ The members of the Armory Board serve without additional compensation.¹⁴ It was the intent of Congress as stated by Senator Bible, Chairman of the District of Columbia Committee, that the operation of the Stadium by the Armory Board was "to be in the nature of a private venture."¹⁵ The Stadium Act reflects this intent by conferring on the Armory Board broad authority to act on behalf of the government as the landlord of Kennedy Stadium.

¹² Affidavit of Dr. Wilson H. Elkins, President of Maryland University, filed 11/20/67.

¹³ 2 D.C. Code, 2-1702 (1967 ed.)

¹⁴ Ibid.

¹⁵ 103 Cong. Rec. 13567.

Restrictive Covenant

The Redskins engaged in arms-length negotiations with the Armory Board for approximately one and a half years before the Redskins finally signed a lease agreement dated December 24, 1959.¹⁶ The negotiations consisted of many meetings between the late George P. Marshall, President of the Redskins, his attorneys, the Armory Board and attorneys of the Corporation Council's Office.¹⁷ In a memorandum to the Armory Board, the late Chester Gray, Corporation Counsel, advised that Mr. Marshall was demanding, as a condition of the lease, that the Stadium would not be leased to any other professional football team.¹⁸ The Redskins obtained the inclusion of paragraph II(e) in the lease, which prohibits the use of the Stadium by any other professional football team, during the thirty year term, for the years 1961 through 1990, including the seven Sundays, fourteen Friday and fourteen Saturday nights and Thanksgiving Day during the football season, when the Stadium is not used by the Redskins.

The language of paragraph II(e) of the lease, provides as follows:

¹⁶ App. 38.

¹⁷ Minutes of Meetings of the Armory Board indicate negotiations were carried on between the Armory Board and representatives of the Redskins during thirteen meetings commencing on July 22, 1958 and ending December 22, 1959. See Armory Board's Answer To Interrogatories, No. 3(b) filed 8/15/67.

¹⁸ App. 69. Armory Board admitted the authenticity of the Memorandum dated 4 May 1959 of Chester H. Gray, Corporation Council, deceased, Exhibit D to Plaintiffs' Request for Admission of Authenticity of Documents filed 8/25/67, in Stipulation of Armory Board filed 10/13/67.

"The Lessor shall have the right to lease or otherwise permit the use and occupancy of the Stadium during any period exclusive of such specific dates referred to herein for any purpose or purposes, (except provided in subsection (a) of this Paragraph II), including (but not limited to) school, college or other amateur or professional baseball, football and basketball games and, also, for such other use or purpose as a Lessor may determine, provided that at no time during the term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins."

It is material to a full understanding of this case to note that, if the Redskins had had the limited intention of protecting their use of the Stadium from possible interference from other football tenants, instead of the intent to exclude competition and to protect their monopoly, limited restrictive provisions would have been sufficient. More reasonable provisions would have been covenants such as the Redskins shall have the first choice of playing dates, no other team shall play within twenty-four hours of any Redskin game, locker rooms used by the Redskins shall not be used by other teams, or, for the purpose of maintaining the grass on the field, no other team shall use the Stadium field for regular practice.

In addition to the restrictive covenant protecting the monopoly of the Redskins, its effect on the use of the Stadium is contrary to the purpose of the Stadium Act "to provide the people of the District of Columbia with a stadium suitable for holding athletic events."¹⁹ It limits the teams the public can see perform and the number of games the public has the opportunity to attend. It also prevents the maximum use of the Stadium and prevents the Armory Board from obtaining rent from a second team that would decrease the burden of the taxpayers.

¹⁹2 D.C. Code, 2-1720 (1967 ed.)

Plaintiffs' Attempts to Obtain Use of Kennedy Stadium for the Exhibition of Football Games by a Second Professional Team Blocked by the Redskins' Restrictive Covenant

By June 1965, the joint venturers had assembled a group of local businessmen who were ready, willing and able to invest substantial sums of money in an American Football League franchise, the amounts depending on the purchase price and financing terms.²⁰ After numerous meetings and telephone conversations with the Commissioner of the American Football League, the joint venturers submitted a letter to the American Football League, in the form recommended by the Commissioner, offering to purchase a franchise for \$7,500,000.00 and setting forth the financing terms and method of obtaining players as suggested by the Commissioner.²¹ The offer to purchase a franchise was

²⁰Affidavits of James Ellis, William Cohen, Henry P. Woodfield, Raymond Briscuso, and James Mc Creery filed 3/1/68; Hecht Dep. pp. 20-25; Hecht Second Affidavit, par. 2 and 3, Exh. 13.

²¹Hecht Affidavit, Exh. 2 and 2A, filed 11/20/67; Hecht Second Affidavit, filed 3/1/68; Hecht Third Affidavit and Exhibits filed 4/1/68. Whether the restrictive covenant in the Redskins' lease was a substantial factor in preventing the joint venturers from receiving an American Football League franchise is a contested issue of fact. Commissioner Foss of the AFL, in his affidavit and deposition denies that the AFL would have granted a franchise to the joint venturers or their group of investors and denies that the AFL was considering granting a franchise to Washington, D.C., in spite of the fact that (i.) he gave the joint venturers a copy of a franchise offer letter to follow which was previously accepted by the AFL, the form of which had been used only by the two parties to whom expansion franchises were granted, (ii) the Minutes of the AFL state that Washington D.C. was a prime city under consideration, (iii) Foss advised the Department of Interior that the AFL was considering Washington, D.C. and (iv) Nathan Landow, in an affidavit filed 4/19/68, states that Commissioner Foss advised him, after the joint venturers had ceased to actively seek an AFL franchise, that if he obtained the use of Kennedy Stadium, the AFL would grant him a franchise.

contingent upon the joint venture, or the group of investors, obtaining the use of Kennedy Stadium for the exhibition of home games.

The joint venturers submitted a letter to the Armory Board offering to lease Kennedy Stadium on those Sundays, Friday nights and Saturdays and other times the Stadium was not being used by the Redskins for the minimum guaranteed rent of \$100,000.00 or 12% of the gross receipts, which is the same percentage paid by the Redskins.²² In a reply letter from the Chairman of the Armory Board, the joint venturers were advised that the Armory Board was prohibited from leasing the Stadium to them because of the restrictive covenant in the Redskins' lease.²³

The joint venturers sought and received the assistance of the Secretary of Interior in their attempt to obtain the use of Kennedy Stadium. At a meeting with the Armory Board on October 7, 1965, the Solicitor of the Department of Interior submitted an opinion to the Armory Board, finding that the restrictive covenant in the Redskins' lease was in violation of the antitrust laws.²⁴ However, the Armory Board continued to adhere to the position that the restrictive covenant prohibited it from leasing the Stadium to another football team without the consent of the Redskins, based on an opinion it received from the law firm of Shea & Gardner.

The Redskins were advised by the Chairman of the Armory Board ²⁵of the request of the joint venturers to use the stadium for the exhibition of AFL games on those days the Redskins were not using the Stadium, but the

²²Hecht Affidavit, Exh. 3, filed 11/20/67.

²³*Ibid*, Exh. 4.

²⁴*Ibid*, Exh. 6.

²⁵Plaintiffs' Request For Admission of Authenticity of Documents by Armory Board, Exhibit G filed 8/25/67 and Stipulation of Armory Board Admitting Authenticity filed 10/13/67.

Redskins did not meet with the plaintiffs nor consent to waive the restrictive covenant. An attorney for the joint venturers met with the President of the Redskins without any success.

During the months of November 1965 through January 1966, an attorney for the joint venturers again met with the President of the Redskins and wrote several letters requesting the Redskins to consent to the use of the stadium by the joint venturers for the exhibition of Continental Football League games.²⁶ The Redskins' consent was never received.

The joint venturers joined a group of men from other major cities to form the United States Football League in the summer of 1966. Mr. Hecht, President of Washington Federals, Inc., which was the corporation that was to own a franchise in the new league, wrote a letter to the President of the Redskins, dated August 9, 1966, requesting the Redskins to consent to the use of Kennedy Stadium by the new league when the Redskins were not using the stadium facilities.²⁷ Mr. Hecht met with the President of the Redskins who advised him that the Board of Directors of the Redskins had denied his request. On September 10, 1966, the Board of Directors of the Redskins passed the following resolution by unanimous vote:

"Resolved, that the President of the corporation be, and he is, authorized to inform Mr. Norman Hecht that the Redskins would not voluntarily relinquish their exclusive privilege to play professional football in D.C. Stadium."²⁸

²⁶Patterson Affidavit filed 11/20/67.

²⁷Hecht Affidavit, Exh. 12, filed 11/20/67.

²⁸Pro-Football, Inc. Answers To Interrogatories No. 5.

SUMMARY OF ARGUMENT

The District Court erred in its application of the "valid governmental action" doctrine to the leasing of Kennedy Stadium by the Armory Board to the Redskins and thereby improperly extended immunity from the antitrust laws to the restrictive covenant in the Redskins lease, which prohibits the use of Kennedy Stadium by any other football team for thirty years. The District failed to distinguish between those government actions that have immunity from the antitrust laws, by virtue of the valid governmental action doctrine, and those government actions that do not have immunity. The District Court, in emphasizing the desirability of the Armory Board entering into a long term lease with the Redskins, failed to consider or deal with the fact that the restrictive covenant is not in the best interest of the public, that its effects are contrary to the purpose of the Stadium Act and that it does not protect or promote the interests of the Armory Board. The Court did not cite any compelling reason for inclusion of the restrictive covenant in the lease or any provisions in the Stadium Act instructing the Armory Board to construct and maintain the Stadium only for the use of one team.

The joint venturers contend that the application of the valid governmental action doctrine to the restrictive covenant in the Redskins' lease, that only serves to maintain the monopoly of the Redskins, is contrary to both the anti-trust policy of maintaining a free and unfettered economy and the purpose and application of the valid governmental action doctrine as defined and applied by the courts. The restrictive covenant is not the product of a government entity taking restrictive action pursuant to a legislative mandate to restrain competition in the public interest,²⁹ nor the product of private parties petitioning government officials,

²⁹*Parker v. Brown*, 317 U.S. 341 (1943).

in policy making positions, for the passage or enforcement of laws or regulations,³⁰ nor the product of the government entering into an exclusive contract for the performance of a government service which the legislature authorized and instructed the government entity to perform in the public interest.³¹

The First Circuit Court of Appeals in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F. 2d 25 (1st Cir. 1970), recognized that the valid governmental action doctrine should not be applied to commercial dealings between private parties and government entities. Our own Court of Appeals, in two regulatory industry cases, has adopted the view that contracts for the use of government facilities by private parties, and even government entities, are not immune from the policies and restrictions of the antitrust laws merely because a government entity is a party to the contract.³²

The restrictive covenant in the Redskins' lease is the product of arms-length negotiations, for the use of a municipal stadium for a commercial purpose, between a private party and a government entity acting as a landlord. The leasing of a public facility to a private party for commercial use is not the kind of government action that comes within the "valid governmental action" doctrine. Thus, the District Court erred in extending the immunity of the valid governmental action doctrine to the restrictive covenant in the Redskins' lease.

³⁰*Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1965); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

³¹*E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F. 2d 52 (1st Cir. 1966); *Sun Valley Disposal Co., Inc. v. Silver State Disposal Co., et al.*, 420 F. 2d 341 (9th Cir. 1969).

³²*Marine Space Enclosures, Inc. v. Federal Maritime Commission*, U.S. ____ App. ____, 421 F.2d 577 (D.C. Cir. 1969); *National Aviation Trades Association v. Civil Aeronautics Board*, ____ U.S. ____ App. 420 F.2d 209 (D.C. Cir. 1969).

ARGUMENT

I

The District Court failed to consider that the restrictive covenant serves neither the interests of the public nor the Armory Board and is not the kind of government action that is immune from the antitrust laws.

The District Court recognized that the Stadium Act authorized the Armory Board to construct, maintain and operate the Stadium in order to provide the people of the District of Columbia with a stadium suitable for holding athletic events. In addition, the Court made the following observations. First, the Court observed that the legislative history of the Act, in its opinion, reveals that the Stadium would not have been built unless a long term lease was entered into with the Redskins. Secondly, that the contract between the Secretary of the Department of Interior and the Armory Board for the construction, maintenance and operation of the Stadium was approximately for the same thirty year period as the Redskins' lease. Thirdly, that the Armory Board was authorized to issue thirty year bonds to finance the construction of the Stadium. Based on these observations, the Court reasoned that the leasing of the Stadium to the Redskins for thirty years was pursuant to the mandate of the Stadium Act and was governmental action exempt from the antitrust laws.³³

The Court, in emphasizing the thirty year term of the Redskins' lease, completely ignored the restrictive covenant prohibiting the use of the Stadium by any other professional football team. It failed to consider or deal with the fact that the restrictive covenant is not in the best interests of the public and is contrary to the purpose of the Stadium Act. In fact, the restrictive covenant does not even pro-

³³ App. 32 and 33.

protect the interests of the Armory Board. The restrictive covenant limits the teams the public has the opportunity to watch perform, limits the number of games the public can attend, prohibits the maximum use of the Stadium and prevents the Armory Board from collecting additional rental income direly needed to pay the interest on the construction bonds. The restrictive covenant solely protects the monopoly of the Redskins and maximizes its gross receipts. With more teams playing in the Stadium, more games and higher gross receipts, the public would be more thoroughly served in accordance with the purpose of the Stadium Act. The Court did not point to one compelling reason for inclusion of the restrictive covenant in the lease or point to any provision of the Stadium Act, directly or indirectly, instructing or authorizing the Armory Board to construct, operate and maintain the Stadium solely for the use of the Redskins during each football season for thirty years.

The joint venturers do not contend that the thirty year term of the Redskins' lease, by itself, violates the antitrust laws. What the joint venturers challenge, as an illegal restraint of trade, is the additional provision in the lease prohibiting the use of the stadium by any other professional football team until the year 1990. The fact that a long term lease with the Redskins was desirable to the Armory Board served to increase the bargaining power of the Redskins with which to press their added demand that the stadium not be used by any other professional football team. To permit a private party to use its bargaining power, derived from economic circumstances, to obtain from a government entity contractual provisions that will foreclose competitors and maintain its private monopoly, is contrary to both the antitrust policy of maintaining a free and unfettered economy and the purpose and application of the valid governmental action doctrine as defined and applied by the courts.

II

Supreme Court decisions do not support the application of the valid governmental action doctrine to the restrictive covenant in the Redskins' lease.

The application of the valid governmental action doctrine by the District Court to the restrictive covenant in the Redskins' lease is contrary to the Supreme Court's interpretation of the Sherman Act as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade"³⁴ and its general reluctance to grant antitrust immunity because of the "indispensable role of antitrust policy in the maintenance of a free economy."³⁵ With this policy in mind, we turn to examine the valid governmental action doctrine.

The valid governmental action doctrine was first announced by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). The Court held that the California State Legislature had the right to regulate an industry by reducing competition when it was for the public benefit and in the best interest of the industry. The California Legislature passed an act authorizing state officials to establish programs for the marketing of agricultural commodities so as to restrict competition among growers and maintain prices. A packer of raisins brought a suit to enjoin the operation of the agricultural marketing scheme. The Court ruled that the Sherman Act was not intended to restrain state legislative action or official action directed by the state legislature and stated:

"The state in adopting and enforcing the prorate program made no contact or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the res-

³⁴ *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

³⁵ *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963).

straint as an act of government which the Sherman Act did not undertake to prohibit."³⁶

The teaching of the *Parker* case is that the doctrine of valid governmental action confers antitrust immunity only when the legislature, acting for the people, determines that competition is not the best thing for a particular industry or the public interest and deliberately attempts to provide an alternative form of public regulation.

In addition to originating the valid governmental action doctrine in *Parker*, the Supreme Court also provided guidance for lower courts and put private parties on notice that the participation of a government entity in an agreement with a private party for the use of a public facility does not exempt the parties or the agreement from the antitrust laws. The Court stated that "we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade,"³⁷ and then cited *Union Pacific R. Co. v. United States* 313 U.S. 450 (1941), a case where the Court held that Kansas City had entered into a private agreement with the Union Pacific Railroad Company for the construction, operation and exclusive use of a railroad terminal in violation of the Elkins Act. Thus, the Court clearly pointed out that it recognized a distinction between the act of a state or municipality entering into an agreement or contract with a private party in restraint of trade and a restraint of trade imposed by a state through its legislative power in the public interest.

The valid governmental action doctrine, as applied in the *Parker* case, is clearly not applicable to the restrictive covenant in the Redskins' lease, because it is not the product of either the Federal or District government exercising its sovereign power to regulate an industry by reducing competition for the public benefit. However, the *Parker* case

³⁶317 U.S. at 352

³⁷*Ibid.* at 351.

serves as a guide for this case, since the restrictive covenant is an agreement between a private party and a government entity, which the Court strongly implied would not be immune from the antitrust laws, and because Congress did not determine it to be in the public interest to instruct the Armory Board to limit the use of the stadium to one team.

Assuming that the restrictive covenant in the Redskins' lease is not protected by the valid governmental action doctrine as applied in *Parker*, we next consider whether the restrictive covenant falls within the rule of the other two Supreme Court decisions, that have applied the doctrine in *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1965) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), which hold that joint efforts of private parties to influence the passage or enforcement of laws or to persuade government officials to take particular action with respect to a law or regulation, do not violate the antitrust laws.

In *Noerr*, a trucking association brought a suit charging a conspiracy in restraint of trade against certain railroads alleging that the railroads had initiated a misleading publicity and lobbying campaign designed to obtain the adoption of legislation injurious to the trucking business and to persuade the Governor of the state to veto a pro-trucker bill. The Supreme Court reversed judgments of liability on the grounds that the purpose of the Sherman Act is not to regulate political activity and that the first amendment protects the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws. The Court strongly emphasized the political nature of the railroad's activities repeatedly referring to the "passage or enforcement of laws."

In *Pennington*, two large coal companies and officials of the union sought, among other things, to persuade the Secretary of Labor to establish a higher minimum wage for employees of contractors selling coal to the TVA on long-term contracts which would make it difficult for small

companies to compete in the TVA market. The Walsh-Healy Act, 41 U.S.C. § 35 *et seq.*, authorized the Secretary of Labor to set wage levels which he deemed to be in the public interest and required the Secretary to follow the procedures set forth in the Administrative Procedure Act, including notice, public hearing and judicial review, in making wage rulings. The joint effort of the mining companies and union officials to persuade the Secretary of Labor to increase the minimum wage falls well within the *Noerr* ruling that grants immunity from the antitrust laws for attempts to influence the enforcement of laws. The Court in basing this part of its decision on its prior *Noerr* ruling clarified its position by stating that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."³⁸

As interpreted by the First Circuit Court of Appeals,³⁹ the thrust of *Noerr* and *Pennington* is aimed at insuring free access to public officials vested with significant policy making discretion. Neither in *Noerr* nor *Pennington* did the Court extend the *Noerr* immunity to public officials engaged in purely commercial dealings similar to the facts in the present case. Neither the rationale nor the scope of the *Noerr* and *Pennington* exemptions apply to the Redskins' restrictive covenant which was the product of arms-length bargaining between a private party and government officials acting in their administrative capacity as landlord for the leasing of a public facility. When a government entity assumes the role of landlord, tenant, purchaser or seller in the economy, the considerations suggesting antitrust immunity for action in an exclusively political context are not applicable.⁴⁰

³⁸381 U.S. at 670.

³⁹*George R. Whitten, Jr., v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 32 (1st Cir. 1970).

⁴⁰*Note, Application of the Sherman Act To Attempts To Influence Government Action*, 81 Harv. L. Rev. 847 (1968).

III

Court decisions that apply the valid governmental action doctrine to exclusive contracts between government entities and private parties for the performance of a government service are not applicable to the Redskins' restrictive covenant.

The Court erred in relying upon *E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F. 2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947 (1967), and *Sun Valley Disposal Company, Inc. v. Silver State Disposal Company*, 420 F. 2d 341 (9th Cir. 1969), as authority supporting its application of the valid governmental action doctrine to the Redskins' restrictive covenant. In *Wiggins*, the Port Authority determined that it was necessary to have only one fixed base operation at Logan Airport. In accordance with this determination, it entered into an exclusive lease with one fixed base operator. The Court held that the exclusive lease was granted by the Port Authority in the exercise of its valid governmental function. The Court found that the Port Authority, in entering into the exclusive fixed base operation lease, was acting pursuant to a legislative mandate imposed upon it to operate and manage the airport in the public interest.

A close reading of the *Wiggins* case and a recent opinion of the First Circuit of Appeals,⁴¹ by the same three judges, reveals that, in addition to the Court finding that a legislative mandate to operate and manage the airport was imposed upon the Port Authority, the Court was also influenced by the fact that the Port Authority had made an internal management decision in the public interest. The exclusive lease was not the result of a private party's demand in arms-length bargaining, as was the restrictive covenant in the Redskins' lease. The Port Authority unilaterally made

⁴¹ See note 39 *supra*.

the decision that it would be in the public interest to have only one fixed base operator.

A part of managing an airport is providing facilities, fuel, equipment, supplies and services which are used by aircraft, crews, passengers and in handling freight. Instead of the Port Authority exercising its broad authority to manage the airport by purchasing equipment and hiring employees to perform the fixed base services, the Port Authority elected to contract with one fixed base operator to furnish the services the Port Authority was responsible for providing in managing the airport. The Port Authority could have chosen to monopolize the fixed base services itself. The execution of an exclusive lease with a fixed base operator was a means of exercising the Port Authority's valid governmental function, i.e., operation and management of the airport, which was imposed upon the Port Authority by the Massachusetts Legislature.

Nothing in the Court's decision in *Wiggins* indicates that the Court considered that the legislative mandate that gave the Port Authority a monopoly over the management and operation of the airport, also gave the Port Authority a monopoly over its use. The purpose of operating and managing an airport is to provide terminal facilities for use by airlines and passengers. The Court would have been faced with an entirely different situation if the Port Authority had entered into a lease with an airline company which prohibited the use of the airport by any other airlines and created a monopoly over air transportation in the Boston area.

Contracts with airline companies for the use of the airport facilities should not be grouped with and treated in the same manner as contracts for the performance of a service that the Port Authority is responsible for providing under its legislative mandate to manage the airport. The Massachusetts Legislature did not grant the Port Authority the exclusive use of the airport, and, therefore, it does not have the authority to assign to a private company its right

to the exclusive use of the airport facilities. The First Circuit Court of Appeals indicated that it would not apply the immunity of the valid governmental action doctrine to an exclusive lease between the Port Authority and an airlines company, prohibiting other airlines from using the airport facilities, when it recently dispelled the misconceived notion of total immunity for commercial dealings with government entities and announced support for an even handed application of the antitrust laws to private and government commercial dealings, to promote the policy of free and unfettered competition which underlies the Sherman Act.⁴²

In a similar case, *Sun Valley Disposal Company, Inc. v. Silver State Disposal Company, supra*, in which the *Wiggins* case was cited as authority, a County Commission chose to contract with one company to perform a service that the County Commission was directed by the state legislature to provide its citizens, i.e., trash and garbage disposal. Instead of the County Commission purchasing disposal trucks and related equipment and hiring employees to operate it, the County Commission contracted with a private company to perform the government service.

The thrust of *Wiggins* and *Sun Valley Disposal* is that an exclusive contract, between a government agency and a private party, for the performance of a service the government agency is responsible to provide, will be considered the product of valid governmental action, immune from the anti-trust laws, if the responsibility and authority for performing the service is imposed upon the government entity by legislation.

The facts of the present case are very similar to those of *Wiggins*. The Armory Board has been given broad legislative authority to manage and operate Kennedy Stadium and, therefore, it is responsible for providing the services required for the operation of the stadium. Like the Port Authority,

⁴²424 F. 2d at 33, 34.

it may either purchase the necessary equipment and hire employees to perform the services, or it may elect to contract with one or more companies to provide the services, either of which method would be an exercise of its broad management authority and therefore valid governmental action. For example, a part of managing a stadium is the operation of concession stands to provide food services for spectators. The Armory Board may either purchase the equipment and hire employees to provide the food services to spectators itself or contract with one company to provide the services, which is comparable to the Port Authority contracting with one company to provide the fixed base operations to serve the airlines and passengers.

Another analogy to *Wiggins* may be drawn with the leasing of the Stadium. Part of managing and operating a stadium is renting and leasing it to sports teams for the exhibition of their games. Congress has specifically authorized the Armory Board to lease the Stadium.⁴³ Instead of the Armory Board managing the leasing of the Stadium itself, it may choose to enter into an exclusive contract with a real estate company to manage the leasing, according to the rule of *Wiggins*.

Although the Armory Board has been granted the authority to lease the Stadium, Congress did not grant it the exclusive use of the Stadium or instruct it to promote and conduct sports events to be exhibited at the Stadium or to operate professional teams. Therefore, in leasing the Stadium to the Redskins for the exhibition of professional football games, the Armory Board was not contracting with a private party to perform a service it was authorized by Congress to perform or a service necessary to the management and operation of the Stadium, or assigning its exclusive right to use the Stadium. Thus, the restrictive covenant in the Redskins' lease cannot be deemed to be the product of valid governmental action based on the decisions in the *Wiggins* and *Sun Valley Disposal* cases.

⁴³2 D.C. Code 2-1723(8); App. 71.

IV

Application of the valid governmental action doctrine to the exercise of executive discretion to protect the public interest is not applicable to the Redskins' restrictive covenant.

The Court was concerned with the authority of the Rural Electrification Administration to require 35-year requirements contracts to secure a loan made to finance construction of a generating plant and transmission lines in *Alabama Power Company v. Alabama Electric Cooperative*, 394 F. 2d 672 (5th Cir. 1968). The requirements contracts were the product of an exercise of the executive discretion of the Administrator for a government purpose, i.e., to secure loans made by the government, pursuant to the Administrator's authority under the Rural Electrification Act.⁴⁴ The Court held that the private cooperatives could not be held for violation of the antitrust laws for doing something the government required.

There exist important distinctions between *Alabama Power* and the present case. In *Alabama Power* the government itself required the requirements contracts based upon the exercise of its executive discretion, whereas the Redskins restrictive covenant was demanded by a private party, during arms-length bargaining between a lessor and tenant. In *Alabama Power* the requirements contracts protected the interests of the government in the event of a default in the payment of a loan. In the present case, the restrictive covenant does not protect the interests of the Armory Board or the public, but rather solely protects the monopoly of the Redskins.

The opinion of the Court in *Alabama Power* was not unanimous, and the dissenting opinion of Judge Godbold thoroughly reviews the hesitancy of the Supreme Court in prior decisions to exempt regulated industries from the anti-

⁴⁴ 7 U.S.C. 901 *et seq.*

trust laws. This case has generated considerable controversy among legal scholars as an improper application of the valid governmental action doctrine.⁴⁵

V

The valid governmental action doctrine is not applicable to commercial dealings between private parties and government entities.

In a precedent setting decision in *George R. Whitten, Jr. Inc. v. Paddock Pool Builders, Inc.*, 424 F. 2d 25 (1970), the First Circuit Court of Appeals dispelled any misunderstanding that its decision in the *Wiggins* case stood for the proposition that all acts of government agencies are immuned from the antitrust laws. In the *Paddock* case, the Court was confronted with a swimming pool contractor who persuaded public bodies to adopt the contractor's specifications designed to prevent other contractors from obtaining the pool contracts. The Court, after a very thorough discussion of the *Parker*, *Noerr* and *Pennington* cases, held that the immunity from the antitrust laws for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes.

The Court expressed doubt whether the Supreme Court, without expressing additional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings. It explained that the First Amendment does not provide the same degree of protection to purely commercial activity that it does to attempts at political persuasion. The Court pointed out that those who sell to private developers under competitive bidding proce-

⁴⁵ *Comment*, Alabama Power Company v. Alabama Electric Cooperative: Rural Electrification and the Antitrust Laws—Irresistible Force Meets Immovable Object, 55 Va. L. Rev. 325 (1969).

dures have never enjoyed antitrust immunity and, in recognition of the fact that government is the largest single customer in our economy, an even-handed application of the antitrust laws is appropriate to promote the policy of free and unfettered competition which underlies the Sherman Act. The First Circuit adopted the view that commercial dealings between private parties and government entities are not immune from the antitrust laws merely because a government entity is a party.

VI

The Court of Appeals for the District of Columbia Circuit has adopted the policy that contracts for the use of public facilities are not immune from the antitrust laws merely because a government entity is a party to the contract.

The Court of Appeals for the District of Columbia Circuit, in two regulated industry cases, concerning the approval of contracts by the Federal Maritime Commission and the Civil Aeronautics Board, has recognized that an important consideration in leasing public property is whether it will create a monopoly or have anticompetitive effects. In *Marine Space Enclosures, Inc. v. Federal Maritime Commission*, __U.S. App.__, 420 F. 2d 577 (D.C. Cir. 1969), a potential competitor brought an action to review an order of the Federal Maritime Commission approving, without a hearing, a contract between New York City and the New York Port Authority authorizing the Port Authority to construct and maintain terminal facilities on city-owned property. The contract contained restrictive covenants prohibiting New York City and the Port Authority from building another terminal for seventy years and from issuing any permits for construction of terminal facilities to any other party. The Court, in holding that the Commission should fully explore the antitrust questions arising from the restraints in the contracts and hold hearings, reasoned that

"the importance of adherence to the 'fundamental policies' of the antitrust laws is undeniable" and that "a major consideration of antitrust policy is preservation of potential markets" and "potential competitors are among the beneficiaries of the antitrust laws."⁴⁶ Contracts approved by the Federal Maritime Commission are by legislative fiat immune from the antitrust laws. However, this case is of particular interest because the Court in effect instructed the Commission to investigate and considered further the antitrust questions and restraints contained in a contract between two government entities. In remanding the case to the Commission for further proceedings, the Court in effect ruled that a contract between two government entities is not immune from adhering to antitrust policy and restrictions.

In *National Aviation Trades Association v. Civil Aeronautics Board*, ___ U.S. App. ___, 420 F.2d 209 (1969), the Court of Appeals for the District of Columbia Circuit was concerned with the review of a contract between Pan American and the New York Port Authority transferring control of a public airport to Pan American for thirty years. The Federal Aviation Act imposes upon the Board the duty to weigh antitrust considerations and provides "that the Board shall not approve any . . . purchase, lease or operating contract . . . which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the agreement . . ."⁴⁷ The Court did not rule that the Port Authority is a government entity and therefore the contract is immune from the antitrust provisions of the act. Instead, the Court recognized the application of the antitrust provisions of the Act to the contract and the Board's duty to investigate the anticompetitive effects of the contract in holding that the

⁴⁶420 F. 2d at 586, 591.

⁴⁷420 F. 2d at 213.

evidence in the record supported the Board's finding that the proposed agreement would not create a monopoly of general aviation airports in the New York City area.

Thus, this Court of Appeals has already adopted the view that a contract between a private party and a government entity, and even a contract between two government entities, for the use of a government facility or property, that creates and maintains a monopoly, should not be immune from the fundamental policies and restrictions of our antitrust laws merely because a government entity is a party to the contract. By denying the application of the valid governmental action doctrine to the restrictive covenant in the Redskins' lease, this Court will be following its previously adopted view and it will be joining the First Circuit in promoting an enlightened and economically sound approach to the application of the valid governmental action doctrine consistent with antitrust policy.

VII

Rules for the application of the valid governmental action doctrine.

The decisions and dicta in the cases discussed and the antitrust policy of reducing the number of anticompetitive restraints and promoting a free and unfettered economy, reflect and support the development of the following rules for guidance in the application of the valid governmental action doctrine.

1. When a government entity is participating in the economy as a Seller, Purchaser, Lessor or Lessee:

(a) Commercial contracts between private parties and government entities are not immune from the antitrust laws,⁴⁸ except (i) exclusive contracts to per-

⁴⁸*Parker v. Brown, supra*; *George R. Whitten, Jr. v. Paddock Pool Builders, Inc., supra*; *Marine Space Enclosures, Inc. v. Federal Maritime Commission, supra*; *National Aviation Trades Association v. Civil Aeronautics Board, supra*. The antitrust policy to promote a free and unfettered economy.

form a service that the government entity itself has been authorized to perform by the legislature,⁴⁹ and (ii) contracts necessary to protect the interests of the government, and thereby the public interest, pursuant to legislative authority.⁵⁰

(b) Actions of private parties to influence public officials are not immune from the antitrust laws when they are engaged in commercial dealings.⁵¹

2. Actions of government entities and public officials that reduce competition are immune from the antitrust laws, when the legislature determines that competition is not the best thing for an industry or the public interest and authorizes a government entity and public officials to provide an alternate form of public regulation.⁵²

3. Actions of private parties to influence public officials, in policy making positions, for the passage or enforcement of laws and regulations, are immune from the antitrust laws.⁵³

The rules deny the application of the valid governmental action doctrine to government acts that are essentially economic in nature, that do not arise in a political context, and that are not authorized by the legislature. When gov-

⁴⁹*E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority, supra; Sun Valley Disposal Company, Inc. v. Silver State Disposal Company, supra.*

⁵⁰*Alabama Power Company v. Alabama Electric Cooperative, supra.* There exists serious economic reasons why the government should not be permitted to engage in restrictive contracts or acts that protect the commercial interests of the government, and, therefore, the validity of this rule is questionable.

⁵¹*George R. Whitten, Jr. v. Paddock Pool Builders, Inc., supra.*

⁵²*Parker v. Brown, supra.*

⁵³*Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc., supra; and United Mine Workers v. Pennington, supra.*

ernment action is taken within an economic context, application of the policies and restrictions of the Sherman Act would promote the national economic policy of reducing the number of anticompetitive restraints in the economy.

In the present case, the lease and the restrictive covenant are solely economic in nature and are not the product nor a part of the political process. The restrictive covenant is not required to protect either the interests of the Armory Board or the public, in fact, it is contrary to such interests. Denial of the application of the valid governmental action doctrine to restrictive covenant will not in any way infringe upon the sovereign power of the Federal government or the District of Columbia. It will not infringe upon the right of any party to petition government officials to influence the passage or enforcement of laws and regulations.

Application of the policies and restrictions of the anti-trust laws to the restrictive covenant will reduce by one the existence of anticompetitive restraints not in the public interest and will promote the antitrust policy of a free and unfettered economy.

CONCLUSION

The District Court erred in ruling that the restrictive covenant in the Redskins' lease is the product of the kind of government action that comes within the valid governmental action doctrine and, therefore, is immune from the anti-trust laws. The order of the District Court granting the defendants' motion for summary judgment on Counts I, II, and III of the second amended complaint should be reversed

and the case should be remanded to the District Court for trial.

Respectfully submitted,

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September 3, 1970



BRIEF FOR APPEALERS

IN THE

United States Court of Appeals

For the District of Columbia

No. 24,448

Norman F. Hecht, et al., Appellants,

vs.
F.W. Woolworth, Inc., et al., Appellees.

Appeal From the United States District Court for the
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FILED OCT 15 1964

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CLERK OF COURT
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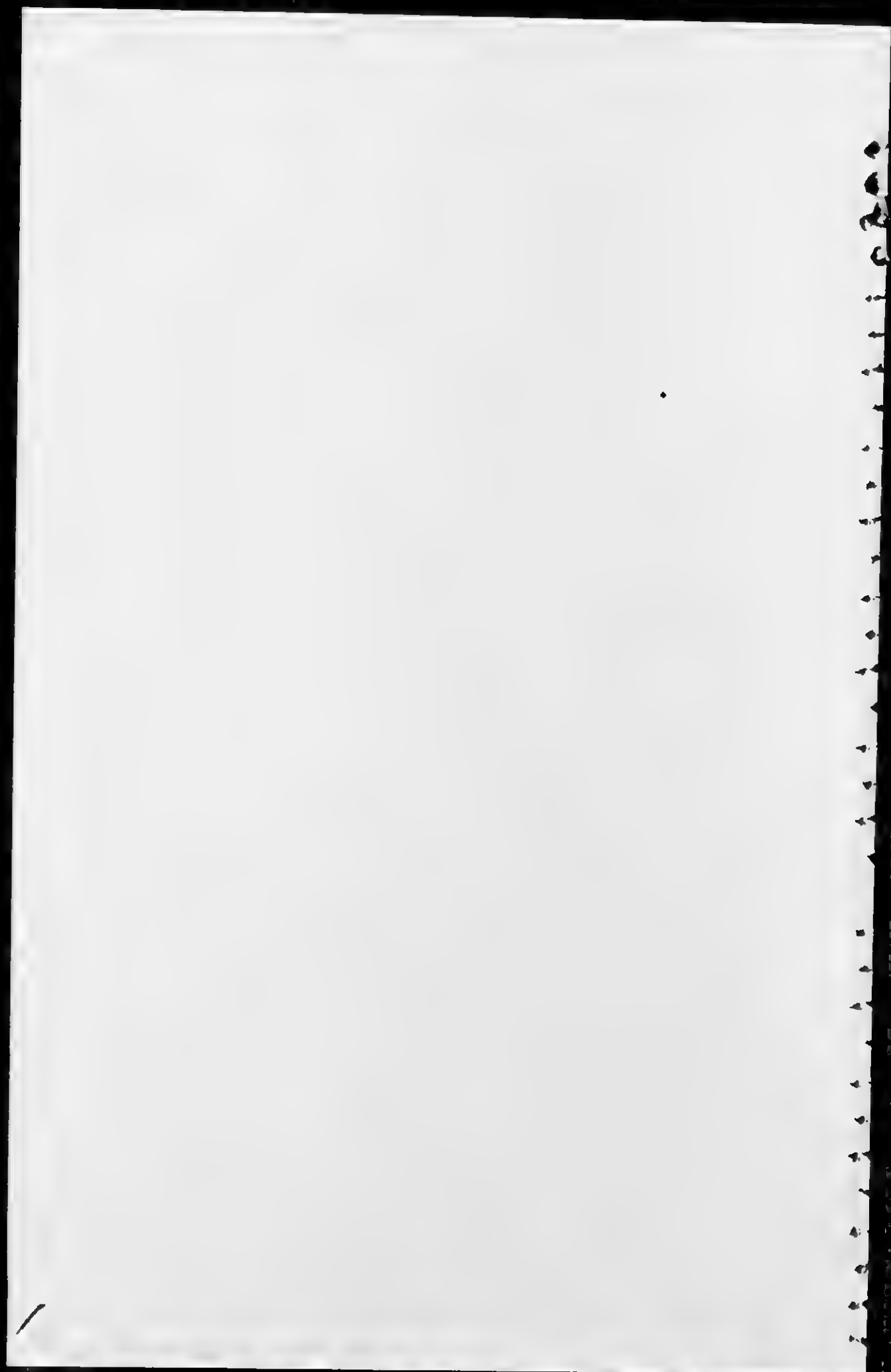
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,446

NORMAN F. HECHT, ET AL., *Appellants*,

v.

PRO-FOOTBALL, INC., ET AL., *Appellees*.

Appeal From the United States District Court for the
District of Columbia

BRIEF FOR APPELLEES

ISSUES PRESENTED FOR REVIEW

1. Whether or not the execution of the Robert F. Kennedy Stadium lease between the District of Columbia Armory Board and Pro-Football, Inc. ("Redskins") constituted valid governmental action which is immune from application of the antitrust laws.

2. Whether or not the Robert F. Kennedy Stadium lease between the District of Columbia Armory Board and the Redskins was exempted from application of the antitrust laws by the D.C. Stadium Act, 2 D.C. Code, § 2-1720 (1967 ed.).*

* The second of these issues was presented to the District Court but was only indirectly passed upon below. It is presented to this Court as an additional basis for affirmance of the judgment of the District Court.

STATEMENT OF THE CASE

This is a suit under the antitrust laws in which appellants (plaintiffs) claim that they were promoters seeking to organize a group of investors to establish a professional football franchise in the District of Columbia, that they had been offered a franchise by the American Football League ("AFL") and the Continental Football League ("CFL") on condition that they could obtain a suitable stadium, and that they were not able to obtain a franchise because the lease between the District of Columbia Armory Board and the Redskins includes a provision prohibiting use of the Stadium by another professional football team for a period of 30 years.* The second amended complaint contained additional allegations in Counts IV and V relating to the merger agreement between the National Football League and the American Football League. These Counts were dismissed in a consent order dated June 17, 1970. Although paragraph 33(d) in Count III refers to the merger of the AFL and NFL, the issue of the legality of the merger is no longer in this case.**

There is no dispute as to the facts upon which summary judgment was based. Nor are there any disputed facts pertaining to the second issue presented for review. How-

* The District Court noted that at oral argument counsel for the plaintiffs "conceded that, other than as promoters who are attempting to organize a professional football team, plaintiffs . . . had no business or property that could in any way be injured by the alleged violations of the antitrust laws." (App. 26). Since appellants are referred to in their brief as the "joint venturers," they will sometimes be referred to here as the "joint venturers" or collectively as the "joint venture." Appellees, wherever possible, will be referred to by their individual names, i.e., "Redskins," "NFL," and "Armory Board."

** The joint venturers have not appealed from the District Court's order of May 13, 1968, dismissing the action as to Milton W. King. In addition to named defendant Pete Rozelle, the joint venturers have been unable to obtain service of process on named defendants American Football League and Milton Woodard. Those three named defendants as well as the Board of Commissioners of the District of Columbia were dismissed from the action by order of the District Court.

ever, as discussed hereinafter, a number of other factual assertions in appellants' brief are wholly irrelevant to the issues on appeal, and give a thoroughly distorted picture of the joint venture and its ability to acquire a professional football franchise or lease the Stadium.

The key, undisputed fact is that the Armory Board is a governmental agency. This fact is conceded by appellants. (See paragraph 10 of the Second Amended Complaint, App. 5-6) Congress originally enacted the D.C. Stadium Act (2 D.C. Code § 2-1720 (1967)) in 1957, and amended that Act in 1958 and in 1959. As found by the District Court, the statute expressly authorized the Armory Board to construct, maintain and operate the Stadium "[i]n order to provide the people of the District of Columbia with a stadium suitable for holding athletic events and other activities of a nature requiring such a facility." (App. 31). In addition, in plain and unambiguous language, the statute gives the Armory Board wide discretion and authority with respect to the leasing of the Stadium. It provides in part:

"In order to carry out the purposes of this subchapter, the Board is authorized *without regard to any other provision of law*, but subject to any contract entered into with the Secretary of the Interior under section 2-1721 [for the use of the Stadium site]—

"(1) *to determine all questions concerning the use of the stadium for the purposes of this subchapter;*

"(8) *to rent or lease from time to time for any of the purposes of this sub-chapter, all or any part or parts of the stadium including any or all structures, equipment or facilities of the stadium, at such rental values and for such periods of time as the Board shall determine. . . .*" (Emphasis supplied.) (2 D.C. Code, § 2-1723).

The lease between the Armory Board and the Redskins was entered into on December 24, 1959, shortly after the

Board had received final authorization from Congress to construct the Stadium. The provisions of the lease were agreed upon after lengthy bargaining and negotiations, beginning at least as early as mid-1958. These negotiations were an integral part of the discussion, before Congress and elsewhere, as to whether or not construction of a new publicly owned stadium in the Nation's Capital should be authorized.* Although the challenged lease provision was desired by the Redskins, the Armory Board voluntarily agreed to its inclusion.** The joint venturers do not claim that the Board was fraudulently induced into executing the lease, that the Board participated in any illegal conspiracy, that it engaged in any other unlawful conduct, or that the Board acted *ultra vires*.

* See, e.g., 104 Cong. Rec. 13787 (1958) (Remarks of Sen. Frear: The Redskins and the Senators have informed the Armory Board "that subject to working out details on a mutually agreeable basis with the Board, [each] would be interested in becoming a lessee of the stadium."); 103 Cong. Rec. 6826 (1957) (Remarks of Congressman Kearns: "Then, I think, if we can rent out the stadium to the Redskins and to the Senators and give them the privilege of playing there, that we are going to reduce those bonds quickly.") Congress authorized the start of construction in 1959, and the Stadium was opened in 1961.

** The Stadium is not being operated for "the exclusive use of any one particular tenant," as stated by appellants (Brief, p. 6). The principal tenant is the Washington major league baseball club. The Stadium has been used for many other events, including professional soccer, college football, high school football, etc. In full, the challenged provision is as follows:

"The Lessor reserves and shall have the exclusive right to the use and occupancy of the Stadium and the possession thereof and the rents, issues and profits thereof at all times during the term of this lease except during the dates that such use and occupancy is granted to the Lessee for the purpose of exhibiting professional football games in the National Football League. The Lessor shall have the right to lease or otherwise permit the use and occupancy of the Stadium during any period exclusive of such specific dates referred to herein for any purpose or purposes (except as provided in subsection (a) of this Paragraph II), including (but not limited to) school, college or other amateur or professional baseball, football and basketball games and, also, for such other use or purpose as the Lessor may determine, provided that at no time during the term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins."

In entering into the lease with the Redskins, the Armory Board validly exercised its statutory responsibilities under the D.C. Stadium Act. The question on this appeal is whether the Armory Board's judgment as to how best to carry out its statutory responsibilities is now to be exposed to collateral attack under the antitrust laws.

The Joint Venturers' Claim That They Would Have Established A Franchise But For The Redskins' Lease Is Unrealistic And Without Substance.

Many of the assertions in the appellants' brief inaccurately and improperly describe the "joint venture" and its capability to launch a football operation in the District of Columbia.*

Contrary to the assertions of the appellants, they were never in a position to acquire a District of Columbia franchise in the AFL even if the Stadium had been available to them for leasing, and their failure to obtain a CFL franchise in the District was unrelated to the Redskins' lease provision.**

Appellants were, by their own acknowledgement, acting as "promoters." Individually and collectively, they lacked the financial resources to engage in any significant professional football operations of their own. The District Court noted that the joint venturers have never owned or been associated with an organization which owned and operated a professional football team; that they never had any experience with professional football; that Hecht is the manager and assistant cashier of a branch bank; that

* The facts of record set forth in this subsection are irrelevant to the issues presented for review. They are included solely because of the joint venturers' efforts to depict themselves as individuals of substance who, but for the Redskins' lease provision, would long since have been operating a professional football franchise in the District of Columbia.

** The so-called "United States Football League" referred to in appellants' brief at page 12 simply does not exist. As the District Court noted, it has no operations of any character. (App. 25)

Kagan is part owner and operator of a retail liquor store; and that Miller operates a restaurant. All of the joint venturers intended to continue these full-time occupations even if they were able to successfully promote a franchise. (App. 25-26). Indeed, Hecht, the principal member of the joint venture, viewed his avocational activities as a "lark." (Hecht Dep. at 433).

In pursuit of their objective of acquiring an interest in a football franchise, appellants traded in a wide variety of speculative considerations: the possibility that they might obtain outside financial backing for their various football ventures while acquiring an interest for themselves; the possibility that some professional football league might award them a franchise on terms satisfactory to any group they might be able to develop; and the possibility that they might be able to arrange adequate stadium facilities for any football operations in which they might be in a position to participate.

At no time did appellants' projected football plans have any solid financial foundation. The joint venture was almost completely without substance. The depositions of Hecht and Kagan reveal that the possible financial backers of the joint venture were never a fixed group. The number and identity of those who even expressed interest shifted, and there were many differing ideas on how to approach the problem of acquiring a franchise. (Hecht Dep. at 20-35; Kagan Dep. at 16-20). At various times the possible financial backers fell into several separate and competing groups. Miller was almost totally ignorant of the identities of the various groups. (Miller Dep. at 28-29). Kagan and Miller were not even members of one of the groups. (Hecht Dep. at 36).

No binding or definite financial commitments were made either by the joint venturers or by any of their supposed supporters. The projected corporation which was to operate the franchise was never organized, and no decisions

had been made as to the ownership interest of any of the three joint venturers, or anyone else, for that matter. (Hecht Dep. at 149; Kagan Dep. at 21-22; Miller Dep. at 21). No plans were ever made as to how the \$7.5 million needed to acquire the AFL franchise would be raised. (Hecht Dep. at 154). The joint venture, as such, neither owned nor leased any property, had no bank account, and, in fact, had no assets of any kind. (Hecht Dep. at 58-59).*

Similarly, appellants never developed any firm franchise commitment from any professional football league. The Commissioner of the Continental Football League, a minor professional football league then operating franchises in a number of American cities, stated on affidavit that the owners of that League had decided not to grant a franchise to appellants because they had not been given accurate information concerning the group's financial backing.** Furthermore, the proposed rental terms for the Stadium (referred to in appellants' brief as \$100,000 minimum per year or 10% of the gross receipts) were wholly out of line with the scale of operations of any franchise then operating in the CFL. At that time, the average attendance at Continental League games was 6,000-7,000 per game, the average annual rentals of clubs were \$17,500, and no Continental League franchise had ever achieved a profit for any year's operation. (Rosen Affidavit, ¶¶ 6, 8, 10).

In like fashion, the AFL, which was one of two major professional football leagues then operating (the Redskins

* In the District Court, appellees (defendants) argued that the joint venturers did not possess the necessary "business or property" required for recovery in a private treble damage action. § 4 of the Clayton Act, 15 U.S.C. § 15 (1964). See, e.g., *Peller v. International Boxing Club, Inc.*, 227 F.2d 593 (7th Cir. 1955). However, the District Court did not reach this issue in granting summary judgment.

** Rosen Affidavit, ¶¶ 17, 19. The Commissioner of the CFL had been informed by the joint venture that either the Catholic University stadium or a high school stadium in Virginia was available. Either of those stadiums would have been satisfactory to the CFL. (Rosen Affidavit, ¶ 13).

being a member of the rival and more established NFL), never made any commitment of any character to appellants. The Commissioner of the AFL testified that he openly referred to Hecht as "old time waster." (Foss Dep. 107). Both the Commissioner and Lamar Hunt, the principal founder of the AFL and the Chairman of the League's Expansion Committee, affirmed that Washington, D.C. was not being seriously considered for an expansion franchise by the AFL owners and, further, that appellants would not have been given serious consideration as franchise applicants in any event. (Hunt Affidavit, ¶¶ 6, 11; Foss Dep. at 8, 106-07, 114-15). The AFL simply was not interested in placing a franchise in the District of Columbia. (Foss Dep. at 103, 126).

The unrealistic nature of the claims of the joint venture becomes even more apparent when it is realized that the AFL, which was founded in 1960, established only one expansion franchise during the entire period of its operations, and that individuals all over the country, including persons of great wealth, were clamoring for AFL franchises. (Foss Dep. at 12-19). There had been no AFL expansion franchise as of the time the joint venturers began promoting one for the District of Columbia. During the period of their alleged efforts to enter the football business, the AFL actively was seeking to establish its first expansion franchise in Atlanta. After the AFL had determined not to expand to Atlanta in the face of the NFL's intention to establish a franchise in that city, the new AFL franchise was awarded to Miami at a price of \$7,500,000. (Foss Dep. at 64-76, 87, 91).*

* The joint venturers assert in their brief that Washington, D. C. was a "prime city under consideration" by the AFL. (fn. p. 10). However, they ignore the affidavit of Mr. Hunt and the testimony of Commissioner Foss that Washington was not seriously considered at all, and that the names of a number of NFL cities were purposely "leaked out" by the AFL in order to divert the attention of the NFL from cities the AFL was really interested in. (Foss Dep. at 98-99, 122-123).

There were many practical impediments to the placing of a new professional football franchise in any city which already had a long-established and popular NFL franchise. The impediments to AFL expansion to Washington, D.C. were unusually difficult. Immediate large-scale football operations within the District would have required the AFL franchise to share the Stadium with the established NFL franchise. Only once in modern sports history have two major league professional football teams attempted to play their home games in the same stadium. That experience was unsatisfactory from the standpoint of both clubs, contributing to the decision of one of them to move the franchise to another city. (Hunt Affidavit, ¶¶ 9-10).*

Moreover, the regular scheduling of major league professional football on Saturdays or Friday evenings, as contemplated by the joint venturers, is, for all practical purposes, foreclosed by a Federal statute and Congressional opposition to the telecasting of professional football games on those days. (Hunt Affidavit, ¶ 9(6)).**

Furthermore, the joint venturers had no justifiable reason to believe they could lease the Stadium even if they

* The Fourth Circuit has previously found Washington, D. C. to be a "natural monopoly" market insofar as professional football is concerned. *American Football League v. National Football League*, 323 F.2d 124 (4th Cir. 1963).

** Congress has imposed strict limitations on the telecasting of professional football games on Friday evenings and Saturdays during the football season (15 U.S.C. § 1293 (1968)). These days are traditionally used for college and high school games. See, e.g., Hearings on S. 3817 Before the Antitrust Subcommittee of the House Committee on the Judiciary, 89th Cong., 2d Sess. 5-6 (1966) ("Professional Football League Merger"); S. Rep. No. 1087, 87th Cong., 1st Sess. 3 (1961) ("Telecasting of Professional Sports Contests"). Appellants' assertion that the Redskins' lease prohibits the use of the Stadium by any other professional football team on "seven Sundays, fourteen Fridays and fourteen Saturday nights and Thanksgiving Day during the football season" (Brief, p. 8) is thus quite misleading. Moreover, the unrealistic nature of appellants' plans is demonstrated by the fact that, despite the above mentioned Federal statute, they planned to rely heavily on television revenues for operating capital (Hecht Dep. at 172, 197-99; Miller Dep. at 120-21), and the joint venturers apparently were totally unfamiliar with the statute. (Miller Dep. at 121-23).

had been able to organize a group to acquire a franchise. The Chairman of the Armory Board testified on deposition that he did not know the identity of any member of Hecht's group other than Hecht, although that information was requested by the Armory Board. The joint venturers gave the Board no indication that they would be financially able to lease the Stadium if they were awarded a franchise. The financial ability of Hecht's group was not made known to the Board; no proposed lease was presented to the Armory Board, although the Board attempted to obtain one from Hecht; no projections of any kind were submitted to the Armory Board; and Hecht's group never presented any evidence to the Armory Board that it could obtain an AFL franchise if the Stadium were available. The Armory Board never agreed to lease the Stadium to the joint venturers under any conditions, even if the joint venture were able to obtain a franchise (Kane Dep. at 21, 24, 33-34), and never made any commitments of any kind to Hecht or any member of his group. (Bergman Dep. at 54).

Finally, there is nothing whatever in the record to suggest that access to the stadium by appellants would actually have served the interests of the Stadium or of the Armory Board or that any member of that Board had reached a conclusion to that effect. Commissioner Tobriner told Hecht's group that "even if we were free to negotiate, we would have to look into the matter of whether it would be wise to have two teams in the stadium." (Kane Dep. at 24-25). The terms of the Redskins' lease obviously would have been modified if a new professional football tenant began to share the Stadium. This was a matter of concern to members of the Armory Board, including then D.C. Commissioner Tobriner, and Hecht was aware of that concern. Thus, the minutes of the Armory Board note Commissioner Tobriner's feeling that the Redskins' lease "might be materially altered" if the Stadium were leased to an AFL franchise. (Kane Dep. at 24-25).

In sum, it appears that the joint venturers were enamored with the idea of entering the professional football field, as were and are innumerable others, but were unable to move their project beyond the realm of desire. The record shows that they did a certain amount of running around, contacting individuals in the business and talking to the AFL and CFL Commissioners and District of Columbia officials. They filed a franchise application, and spent a small amount of money along the way. However, there never was any chance they would obtain an AFL franchise even if the Stadium were available to them for leasing, and there is no showing that they could have leased the Stadium even if they were awarded a CFL or an AFL franchise in the District of Columbia.

I. THE EXECUTION OF THE ROBERT F. KENNEDY STADIUM LEASE BETWEEN THE DISTRICT OF COLUMBIA ARMORY BOARD AND PRO-FOOTBALL, INC., CONSTITUTED VALID GOVERNMENTAL ACTION WHICH IS IMMUNE FROM APPLICATION OF THE ANTITRUST LAWS.

Appellants have premised their entire argument with respect to the valid governmental action doctrine on the contention that, in managing and leasing the Stadium, the Armory Board is engaged in "purely commercial dealings." But this simply is not so. The operation of a Stadium such as this one is not a purely commercial activity. Rather, it is a public activity, as appellants at one point in their brief seem to recognize. (Brief, p. 6). This Court may take judicial notice of the many municipal stadiums throughout the country. As was noted some forty years ago in *Meyer v. City of Cleveland*, 35 Ohio App. 20, 171 N.E. 606, 607 (1930):

"... Since [1896] the erection and maintenance of stadiums in America has come into vogue, until now there are hundreds of them in various towns and cities of the United States. In fact, within the forty-eight states of the Union ninety-three municipal stadiums have been erected, or are in process of erection, to say

nothing of private stadiums and those of colleges and universities. New York City has two municipal stadiums, one in Manhattan and the other in the Bronx. There are such, also, in Chicago, Philadelphia, San Francisco, Los Angeles and Baltimore, the most famous and noteworthy of these being Soldiers' Field in Grant Park, Chicago, with a seating capacity of about 100,000 people. . . ."

It is also settled that such stadiums serve public, not commercial, purposes. Thus, for example, in *Martin v. City of Philadelphia*, 420 Pa. 14, 215 A.2d 894, 896 (1966), the court stated:

" . . . [B]ecause of the public interest in this case, it should be noted that the City [of Philadelphia] has the power to lease the [proposed municipal] stadium to private enterprise, if such a lease would not be inconsistent with the public use of the stadium. (Citation omitted). Even if the ordinance specifically provided that the stadium will be used primarily by privately owned football and baseball clubs, there would be no conflict with the public nature of the stadium, for the City would be entering into the lease not to engage in the private business of promoting sporting events or leasing buildings (which might be a private, not a public, use), but rather as incident to providing for 'the recreation or the pleasure of the public.' " *

The District Court noted that in *City of Cleveland v. Rupple*, 130 Ohio St. 465, 200 N.E. 507 (1936), it was found that "the Cleveland municipal stadium and related city owned structures, including public halls and a parking garage,

* Accord, *Ginsberg v. City of Denver*, 164 Colo. 572, 436 P.2d 685, 688-89 (1968) (involving use of municipal stadium by professional football club). Numerous cases have held that the leasing of a public facility to a private party does not deprive the facility of its public purposes. See, e.g., *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 12 N.Y.2d 379, 388-89, 240 N.Y.S. 2d 1, 5, 190 N.E.2d 402, 404-05, appeal dismissed, 375 U.S. 78 (1963); *Haggerty v. City of Oakland*, 161 Cal. App. 2d 407, 326 P.2d 957, 961-62 (1958).

were held to have been constructed and leased for public purposes." The District Court further commented:

"That such purposes attach to the stadium here is evident from a review of the District of Columbia Stadium Act." (App. 30)*

The governmental nature of the Stadium is evidenced repeatedly by provisions of the D.C. Stadium Act. The Stadium was constructed pursuant to an Act of Congress "in order to provide the people of the District of Columbia with a stadium suitable for the holding of athletic events . . ." (§ 2-1720). The site of the Stadium was obtained pursuant to the Act by condemnation. (§ 2-1721). The construction of the Stadium was financed by bonds issued by a governmental agency. (§ 2-1722). And the Armory Board, "in order to carry out the purposes of this subchapter" (which were clearly public in nature), was authorized to "determine all questions concerning the use of the Stadium . . . and to rent or lease from time to time for any of the purposes of this subchapter all or any part . . . of the stadium . . . at such rentals and for such periods of time as the Board shall determine." (§ 2-1723).

Appellants' quotation (Brief, p. 7) of Senator Bible's statement that the operation of the stadium was "to be in the nature of a private venture" is out of context. Senator Bible was directing himself to a proposed restriction on the

* In discussing a proposal to make the bonds for the proposed D.C. Stadium tax-exempt, Congressman Kearns, a member of the Commission studying the feasibility of the Stadium, said:

"We [Kearns and Congressman Teague, also a member of the Commission] felt it would work like the stadium in Cleveland where the Cleveland Indians use the stadium. It is used by football and baseball. The Nation's Capital does not have a stadium today, and I think we have to have some incentive to build it." 103 Cong. Rec. 6826 (1957).

The Stadium referred to by Congressman Kearns is the municipal stadium referred to in the Meyer and Ruple cases.

Board's authority and urging the deletion of such restriction from the proposed Stadium Act because "it was more desirable that the Board be vested with the authority to make its own decisions as to the letting of the concessions without placing restrictions upon the Armory Board," 103 Cong. Rec. 13,567 (1957). In short, Senator Bible was endorsing what the final terms of the D.C. Stadium Act made clear—that the Board was accorded virtually unlimited discretion in managing and operating the Stadium.

Throughout, appellants overlook the fact that, in leasing the Stadium, the Armory Board acted pursuant to an Act of Congress. It did not enter into a wholly private arrangement with multiple private parties without an express statutory basis for doing so, as did the City of Kansas City in the *Union Pacific* case* (cited in Appellants' Brief, p. 18), a case arising under the Elkins Act, as amended by the Hepburn Act. Those Acts prohibited "any person" from giving or receiving any concession in respect to interstate transportation, and banned "any and all means to accomplish the prohibited end" (313 U.S. at 462). The City of Kansas City was held to be a "person" within the statutory meaning, and was found to have entered into a series of corrupt and secret acts with multiple private parties. The Court said:

"In our view, action by any person to bring about discriminations in respect to the transportation of property is rendered unlawful by the Elkins Act. Any other conclusion would do violence to a dominant purpose of carrier legislation." 313 U.S. at 463.

Here, we are concerned with an attempted application of the Sherman Act. The Federal courts have ruled in a wide variety of cases that so-called "valid governmental acts" are not within the scope of that Act. A number of the valid governmental act cases have concerned circumstances where

* *Union Pacific R. Co. v. United States*, 313 U.S. 450 (1941).

state or Federal agencies or instrumentalities have been given broad statutory authority to regulate economic activity in particular fields or to administer public facilities in accordance with their own determinations of the public interest. The leading case in this field is *Parker v. Brown*, 317 U.S. 341 (1943). This precedent reflects a principle that has been consistently applied by the Supreme Court and uniformly followed by the lower Federal courts in circumstances quite comparable to those of the present case.

In *United States v. Rock Royal Corp.*, 307 U.S. 533 (1939), the Supreme Court concluded that anti-competitive activities carried on by private parties pursuant to a valid federal regulatory scheme are not subject to antitrust penalties. In *Rock Royal*, the Court overturned the dismissal of two suits brought to enjoin an order of the Secretary of Agriculture pursuant to the Agricultural Marketing Act of 1937. In essence the Secretary's order regulated the price structure in the milk industry in a fashion to benefit the producers. In refusing to subject the Secretary's action to Sherman Act restraints, the Court said:

"if ulterior motives of corporate aggrandizement stimulated [the] activities [of the producers], their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly in the market would not violate the Sherman Act" 307 U.S. at 560.

In *Parker v. Brown*, *supra*, the Supreme Court held that state agencies and officers exercising regulatory authority accorded them by the state legislature are not intended to be governed by the Sherman Act. The Court said:

"We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . The Sherman Act makes no mention of the state as such, and gives no hint

that it was intended to restrain state action or official action directed by a state. . . ." 317 U.S. at 350-51.*

Olsen v. Smith, 195 U.S. 332 (1904), is to the same effect. *Olsen* involved a suit by Texas harbor pilots, who had been licensed by the state, to enjoin the activities of non-licensed pilots. Defendants urged, among other things, that the state licensing system was invalid under the federal anti-trust laws because it granted an effective monopoly to the licensed pilots. The Court rejected this argument on the ground that the licensing of pilots was an appropriate subject for state regulation and stated:

"The contention that because the pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority to the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law." 195 U.S. at 344-45.

* Appellants' suggestion (Brief, p. 18) that Parker held that governmental agreements with private parties are subject to the antitrust laws is totally without merit. Subsequent decisions of the Supreme Court and other Federal courts, discussed *infra*, have firmly established the applicability of Parker to governmental agreements with private parties. Moreover, in *Parker* the Supreme Court with great clarity pointed out that States and State officers are not intended to be governed by the Sherman Act:

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

* * *

"The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.'" (317 U.S. at 351)

The meaning then of the phrase in *Parker* ("we have no question of the State or its municipality becoming a participant in a private agreement or combination by others for restraint of trade") becomes clear. In *Union Pacific*, the city had participated in unlawful activities of railroads and shippers. There was no such activity by the State in *Parker*, nor is there in the instant case.

The principle of immunity thus established is not limited to actions of governmental agencies taken in furtherance of broad regulatory schemes. When government agencies are vested with discretion and judgment in carrying out their assigned responsibilities, they have been regularly found to be free of antitrust restraints.

Thus, for example, in rejecting the antitrust challenge to valid government action in *Alabama Power Co. v. Alabama Electric Cooperatives, Inc.*, 394 F.2d 672, 676 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000 (1968), the Fifth Circuit noted:

“‘It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.’” (Quoting *Barr v. Mateo*, 360 U.S. 564, 571 (1958)).*

This rule has been applied in two recent cases closely analogous to the present case. In *E. W. Wiggins, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), the court held that an exclusive contract between the Port

* In similar terms this Court has frequently, in a tort context, emphasized the importance of the discretion commonly accorded government instrumentalities. In *Elgin v. District of Columbia*, for example, this Court said:

“Where [the discretion and judgment involved in a governmental act] are important, it is desirable that they operate freely and without the inhibiting influence of potential legal liability asserted with the advantage of hindsight.”

This follows from the fact that:

“He who rules must make choices among competing courses of action and in the face of conflicting considerations of policy . . . Thus it has been thought wise to . . . let those responsible for conduct of public affairs calculate their courses of action free of [the] intimidating influence [of future lawsuits].” 119 U.S. App. D.C. 116, 118, 337 F.2d 152, 154 (1964).

Authority and a private business for the provision of airport services was a governmental act immune from antitrust attack. Rejecting the argument that in executing the exclusive agreement the Port Authority was acting in a purely proprietary capacity and conducting a private business, the court said:

"... By statute [the Authority] has been constituted a public instrumentality and the exercise of the powers conferred upon it is deemed and held to be the performance of an essential governmental function. It also has wide powers, many of which are bestowed only upon instrumentalities of government.

* * *

"... It is clear that in [executing the challenged contract the Authority] was acting as an instrumentality of the state, pursuant to the legislative mandate imposed on it.... What was done here was in the exercise of a valid governmental function. The antitrust laws are aimed at *private* action, not at governmental action." 362 F.2d at 55. (Footnotes omitted).

The court added that "it would be an unreasonable restriction on the [Authority's] freedom to hold that the [private] defendants acted illegally in having aided it." 362 F.2d at 56.

In *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969), the plaintiff had been put out of business when the County Commission granted its competitor the exclusive franchise for garbage pickup and disposal throughout the county. Summary judgment was awarded to defendants on the ground that the acts complained of were sanctioned by the Nevada State Legislature and by the County Commission. The Ninth Circuit affirmed the award of summary judgment, holding the antitrust laws inapplicable to the exclusive franchise.

In the present case, Congress did not simply determine that the Armory Board should act as a regulatory agency overseeing the private operation of the Stadium. Rather,

Congress determined that the Government itself should construct the Stadium (just as many other legislatures have found public financing of local stadiums to be in the interests of the community) and directed that the Stadium be operated by the Board, an agency of the District of Columbia, in the public interest. The Board was given the broadest discretion to determine the conditions on which the Stadium could be leased. It was authorized "without regard to any other provision of law" to "determine all questions concerning the use of the stadium" and to "rent or lease . . . all or any part or parts of the stadium" at such rental rates and for such period as it determined. 2 D.C. Code § 2-1723.

In leasing the Stadium, the Armory Board exercised its broad statutory authority to make an important policy decision. As the District Court noted, the Armory Board was "aware that a long-term lease with the Redskins was necessary if [its bond] obligations were to be met and the purposes of the Act accomplished." (App. 33). In reaching its decision, the Armory Board had to choose among competing courses of action in the face of various considerations. Exercising the authority granted to it, the Armory Board determined that it could best serve the Stadium's interests and the interests of the public by entering into a long-term, exclusive lease arrangement with the Redskins.

The application of the antitrust laws to the Armory Board's lease with the Redskins would be a direct interference with the Board's carrying out of its statutory responsibilities and contrary to the express language of the Stadium Act giving the Armory Board the power to serve the Stadium's interests as it sees them. Under *Parker v. Brown*, *supra*, and the decisions following it, the Armory Board's judgment in leasing the Stadium cannot be challenged and overridden in a private antitrust suit under the Sherman Act. As with the action of the Port Authority in

Wiggins, "It is clear that in [leasing the Stadium the Board] was acting as an instrumentality or agency of the State, pursuant to the legislative mandate imposed on it" 362 F.2d at 55. The District Court thus correctly held that the Board's action was a governmental act which is exempt from the antitrust laws.

The joint venturers' argument that *Wiggins* and *Sun Valley*, *supra*, do not apply here is to no avail. As here, both of those cases involved governmental agencies having the discretionary responsibility to administer a government-owned facility or to carry out designated governmental functions. Both cases resulted in findings that the action of the agency constituted valid governmental action which was immune from the antitrust laws. The ruling in both of these cases was that the immunity extended to the private parties seeking and obtaining the governmental contract action as well as to the government agency.

The joint venturers state that in *Wiggins* it was necessary to have only one fixed base operator, that the Port Authority in that case was exercising a valid governmental function pursuant to a legislative mandate to operate and manage the airport in the public interest, that the Port Authority unilaterally decided to lease to only one fixed base operator, and that it might have been improper for the Port Authority to lease the airport to only one airline. However, these efforts to distinguish *Wiggins* are without substance. That case was not concerned with whether the Port Authority's judgment was sound, but with whether it was acting within the scope of its authority.* Here, the Armory Board made its decision that it was in the best interest of all, including the public, to enter into the lease

* The merits of the agency's judgment and the question whether the governmental action adversely affects competition have been considered irrelevant in all of the decided "governmental act" cases. Indeed, in *Wiggins*, the First Circuit noted that the Federal Aviation Authority had overturned the Port Authority's judgment (362 F.2d at 54), but that factor was not relevant to the Court's decision on the immunity issue.

with the Redskins on the terms prescribed. It did so in accordance with an express Congressional directive to exercise its own discretion as to how best to serve the Stadium's interests and the interests of the public. Moreover, the Redskins were not and are not established by the Armory Board as exclusive tenants of the Stadium, but as sole tenants of the Stadium for a single limited purpose. That action was a wholly proper exercise of the Board's discretion.

The District Court's decision in the present case draws further support from recent decisions of the Supreme Court. These establish that, where governmental acts are involved, an antitrust action cannot be maintained against private parties because they seek or participate in such acts. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1965). There, the plaintiff trucking association brought an action alleging a conspiracy by the railroads to drive the truckers out of the long-haul transportation business by a publicity and lobbying campaign concededly designed to harm the truckers in the public eye and to secure the passage of state legislation which was injurious to the business of the truckers. In holding that the antitrust laws did not apply to the railroads' action, the Court stated that the Sherman Act forbids "only those restraints and monopolizations that are created, or attempted by the acts of 'combinations of individuals or corporations.'" 365 U.S. at 135-36. The Court added:

"Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out."

* * *

"We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." 365 U.S. at 136.

The Court also held to be irrelevant the fact that the purpose of the railroads' activity was to "destroy the truckers as competitors for long-distance freight business." It stated:

"... at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." 365 U.S. at 139-40.

United Mine Workers v. Pennington, 381 U.S. 657 (1965), made clear that the immunity principle with respect to governmental acts is not limited to legislative acts. That was a suit by the trustees of a labor union pension fund against a small coal company to enforce certain provisions of a collective bargaining agreement. The defendant alleged in a cross-claim that the labor union and the larger coal companies had conspired to induce the Secretary of Labor to exercise his statutory authority to set high minimum wages for employees of companies selling coal to the Tennessee Valley Authority in order to make it more difficult for the smaller companies to compete for TVA contracts. Reaffirming its adherence to the *Noerr* holding, the Court stated that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." (381 U.S. at 670).

It added:

"It is clear under *Noerr* that [the defendant-cross-claimant] could not collect any damages under the Sherman Act for any injury which it suffered from the action of the Secretary of Labor. The conduct of the union and the operators did not violate the Act, [and] the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to be a co-conspirator" *Id.* at 671.

The joint venturers' suggestions that the "governmental act" rule is inapplicable to the Redskins' lease because the Redskins sought the restrictive provision are thus without

legal foundation. Even if the Redskins "demanded" the limitation on the Stadium's use by other professional football clubs as a condition to the lease, as appellants' claim (Brief, pp. 8, 9), such action would clearly fall within the scope of the immunity defined in *Noerr* and *Pennington*, *supra*. Moreover, under these decisions, the questions whether the Redskins might have settled for "more reasonable provisions" or whether the lease only maintains the Redskins' "monopoly", as appellants claim (Brief, pp. 9, 13, 16, 25), are not now before this Court, for it is settled that the immunity defined in *Noerr* and *Pennington* does not turn on whether the private efforts to solicit governmental action were motivated by a desire to limit competition.

The joint venturers do not cite a single decision that supports their view of the present case. The recent decision of the First Circuit in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), *petition for cert. filed*, 39 U.S.L.W. 3037 (U.S. July 2, 1970) (No. 351), does not undermine application of the governmental immunity doctrine in the instant case. In ruling on the correctness of the district court's entry of summary judgment, the First Circuit assumed the truth of the facts alleged by the plaintiff. There, the court was, as it stated:

"... confronted . . . with government acting in a proprietary capacity, purchasing goods and services to satisfy its own needs within a framework of competitive bidding, where the initial responsibility for recommending specifications has been entrusted to a hired professional, and where the selling effort directed at the professional and his public client by [the defendant] was monopolistically motivated and ran the gamut from high pressure salesmanship to fraudulent statements and threats." 424 F.2d at 29.

In reversing a summary judgment for the defendant, the First Circuit found that the agency policies on pool procurement were "neither anti-competitive nor neutral," that

the state law specifically required competitive bidding and that the defendant's activities could be viewed as interfering with such required procedures, that the activities of the defendants were not limited to political persuasion, that the governmental actions in that case were not of a character to "promote broader objectives of public welfare," and that, in these circumstances, the umbrella of *Noerr* and *Pennington* should not be extended to "purely commercial dealings" of the character engaged in by the defendant.

In ruling that these "purely commercial dealings" were not exempt from the antitrust laws, the First Circuit distinguished *Whitten* from its earlier decision in *Wiggins* and described *Wiggins* as "a suit involving an airport service franchise, where a state agency exercised broad authority to manage a monopoly in the public interest." (*Id.* at 30-31). As pointed out heretofore, the instant case does not involve "purely commercial dealings." It does not involve efforts to influence hired private agents of public bodies by deception. There is no underlying statute requiring competitive bidding. Rather, as in *Wiggins*, there is specific legislation granting a governmental agency broad authority and wide discretion to manage and operate a governmental facility.

The District Court's granting of summary judgment in the instant case is supported by a number of decisions of Federal courts extending as far back as 1904. In addition to the cases previously discussed, these include *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), and the decision of this Court in *Association of Western Rys. v. Riss & Co., Inc.*, 112 U.S. App. D.C. 49, 299 F.2d 133 (1962), *cert. denied*, 370 U.S. 916 (1962). See also *Allstate Insurance Co. v. Lanier*, 361 F.2d 870 (4th Cir. 1966), *cert. denied*, 385 U.S. 930 (1966); *Woods Exploration & Production Co. v. Aluminum Company of America*, 284 F. Supp. 582 (S.D. Texas 1968); *Miley v. John Hancock Mutual Life Ins. Co.*, 148 F. Supp. 299 (D. Mass. 1959), *aff'd per curiam*,

242 F.2d 758 (1st Cir. 1957), *cert. denied*, 355 U.S. 828 (1957).

What emerges from the opinions of the Supreme Court and the other opinions cited herein is a rule that where direct governmental action, as distinct from private conduct, has caused the alleged injury to a plaintiff, the provisions of the federal antitrust laws are inapplicable, both as to the government agency involved and as to the private party contracting with that agency. When that rule is applied to the instant case, it must be concluded that the action of the Armory Board in entering into the Stadium lease with the Redskins was a governmental act which is immune from application of the antitrust laws. Accordingly, the judgment of the District Court must be sustained.*

II. THE PROVISIONS OF THE DISTRICT OF COLUMBIA STADIUM ACT EXEMPT THE STADIUM LEASE FROM APPLICATION OF THE ANTITRUST LAWS.

As shown in the preceding section, the Redskins' lease of the Stadium is not subject to collateral attack under the antitrust laws because the Board's act of leasing the Stadium was a valid governmental act. Even if this were not so, the District Court's granting of summary judgment would have to be affirmed for the reason that the terms of the D.C. Stadium Act make clear that Congress exempted the leasing actions of the Board from the antitrust laws.

Parker v. Brown, supra, and the decisions following it, rest on a recognition that the legislature may properly determine that the principles of free competition do not

* The two recent decisions of this Court cited by the joint venturers (pp. 27 and 28 of their Brief) are completely inapposite. Both of them involved appellate review of orders of federal administrative agencies. Both involved interpretations of the basic statutes under which the agencies carried out their regulatory functions, i.e., the Shipping Act and the Federal Aviation Act. Neither of them required an interpretation of the Sherman Act or a decision as to the applicability of the governmental act doctrine.

best serve the public interest in a particular area, and that when the legislature makes such a determination, government agencies may be authorized to make decisions that involve a wide variety of anti-competitive factors. Decisions by such agencies must often consider the public interest and other elements wholly apart from the operation of a free market. When this occurs, application of the anti-trust laws to governmental action would defeat rather than serve the purposes the legislature sought to accomplish.

In enacting the D.C. Stadium Act, Congress did not authorize the Armory Board to conduct activities commonly conducted for profit by private business. Rather, the Congress authorized the Armory Board, whose primary function had been to manage the District of Columbia National Guard Armory, to provide for the construction and to operate a publicly owned stadium in the National's Capital. In so doing, Congress did not require that the Armory Board either construct or lease the stadium on a competitive bid basis. Instead, the Board was authorized to provide for the construction of the stadium "by such means as it determines will most effectively carry out [the D.C. Stadium Act] . . . (including, but not limited to, a negotiated contract)." 2 D.C. Code § 1720 (1967).

Also, as the District Court noted, the Armory Board "was not only authorized to provide the people of the District of Columbia with a suitable stadium, but it was obligated to provide for the payment of the construction, operation and maintenance of the stadium through a bond issue." (App. 32-33). This responsibility necessarily required a considerable exercise of discretion by the Board. A major purpose of constructing this Stadium was to preserve for the local community the two major league professional sports franchises which had long operated in Washington. The determination of how best to do this and of how best to reconcile the long and short term interests of the Stadium, its financial needs, and the problem of conflicting and overlapping uses of the Stadium, were matters left to

the Board's own judgment—specifically under its authorizing statute and impliedly under the circumstances of the Armory Board's creation.

In order to permit the Armory Board to carry out its broad discretionary functions, Congress specifically authorized the Board "to determine all questions concerning the use of the stadium" and "to rent or lease . . . all or any part or parts of the stadium . . . at such rental values and for such periods of time as the Board shall determine" and to do so "*without regard to any other provision of law.*" 2 D.C. Code § 1723(1) and (8) (1967). (Emphasis supplied). This provision, we submit, constitutes a grant of antitrust immunity to the leasing activities of the Armory Board.*

* Decisions holding that the granting of statutory exemptions to the antitrust laws will not be lightly implied (*e.g.*, *California v. F.P.C.*, 369 U.S. 482, 485 (1961)) have no application to the present circumstances. To begin with, such decisions have generally referred to repeals by implication from regulatory statutes. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 & n. 28 (1963). Second, none of the decisions has involved governmental action of the kind involved in the present case. Third, none of the decisions has involved statutory language of the type present in the D. C. Stadium Act (2 D.C. Code § 2-1723), which is so clear as to compel the conclusion that Congress intended the antitrust implications of the unqualified language granting the Armory Board the broadest discretion. Finally, none of the decisions has even suggested that the antitrust laws apply to every form of trade restraint. Indeed, this Court recently noted that "it has long been settled that not every form of combination or conspiracy that restrains trade falls within [the] ambit [of the Sherman Act]." *Webster Junior College v. Middle States Ass'n of Colleges and Secondary Schools*, — U.S. App. D.C. —, — F.2d — (1970) (5 Trade Reg. Rep. ¶ 73,252). In *Webster*, this Court added:

" . . . [I]t is appropriate that courts should interpret [the Sherman Act's] word in light of its legislative history and of the particular evils at which the legislation was aimed.' The Act was a product of

the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-93 (1940)." — U.S. App. D.C. at —, — F.2d at —, petition for cert. filed, 39 U.S.L.W. 3124 (Sept. 24, 1970) (No. 751).

It is established that the words used by a legislature in a statute should be given their plain meaning unless such meaning would lead to "absurd or futile results." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison v. Holly Hill Fruit Prods. Inc.*, 322 U.S. 607, 608 (1944). "The intention of Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture." *Thompson v. United States*, 246 U.S. 547, 551 (1918). "[C]ongress expresses its purpose by words. It is for us to ascertain . . . neither to add nor to subtract, neither to delete nor detract." *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951).

There is, of course, nothing technical about the words "without regard to any other provision of law." The intention of those words is "reasonably intelligible and plain." There is no reason not to accept them "without modification by resort to construction or conjecture." And, certainly, the grant of antitrust exemption with respect to the lease cannot be said to be an "absurd result." Indeed, the very circumstances of the creation of the Armory Board and of the delegating to it of authority to "determine all questions concerning the use of the Stadium" argues that Congress intentionally granted unrestricted discretionary authority to the Board.

The legislative history supports the foregoing view of the D.C. Stadium Act. First, Congress knew that a long-term lease would probably be entered into by the Armory Board with the Redskins. Such a lease was indeed an essential condition of the plan for Stadium financing. Without a long-term commitment from the Redskins, it is diffi-

cult to conceive how the retirement of the bonds for construction of the Stadium could have been anticipated. For example, the following colloquy occurred between Chairman Shea of the Armory Board and members of the committees considering the bill:

"Mr. Teague. Would it defeat [the repayment of the bonds] if the Redskins left Washington?"

"Mr. Shea. If they didn't enter a long-term contract?"

"Mr. Teague. Yes."

"Mr. Shea. We wouldn't build a stadium because it is contemplated that we will get a long-term contract before we build."

"Senator Frear. As a prerequisite." *

While neither the hearings nor the reports mentioned whether the Redskins or any other tenant would be given exclusive rights with respect to any particular form of use, it is quite implausible to suppose that the Redskins' franchise would have committed itself to long-term rental payments of this character except on a basis providing reasonable protection of its own interests as a tenant. That it was entirely reasonable for the Redskins to make this request is supported by a wide variety of circumstances of record and briefly referred to heretofore.

When the D.C. Stadium Act is read in the foregoing context, it becomes clear why Congress expressly accorded the Board unqualified authority "to determine all questions concerning the use of the Stadium" and to enter into leases "without regard to any other provision of law." Accordingly, on the grounds of the D.C. Stadium Act alone, the summary judgment entered by the District Court should be affirmed.

* Hearings on S. 3736 and H.R. 12162 before the Subcommittee on the Judiciary of the House Committee on the District of Columbia and the Subcommittee on Fiscal Affairs of the Senate Committee on the District of Columbia, 85th Cong., 2d Sess. 88 (1958).

CONCLUSION

The District Court's order granting summary judgment for appellees should be affirmed.

Respectfully submitted,

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October 15, 1970



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,446

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 29 1970

NORMAN F. HECHT, et al.,

Nathan J. Paulson
Appellants.

v.

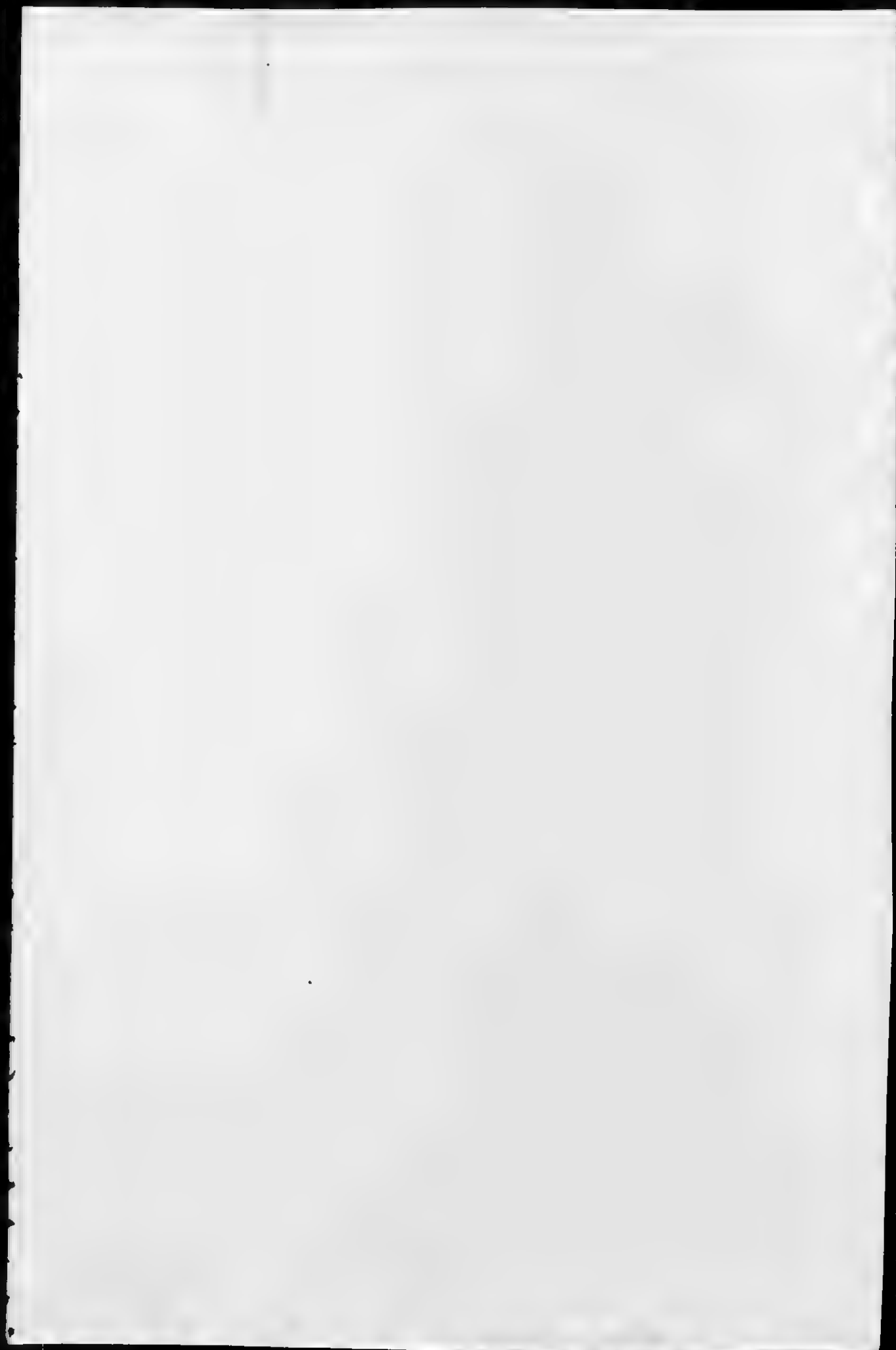
PRO-FOOTBALL, INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

The issue raised by this appeal, whether the restrictive covenant in the lease between the Redskins and the Armory Board is immune from the antitrust laws, is of great public importance because of the effect the decision will have on a large part of the economy. Government agencies and entities when grouped together are the largest participant in our economy. If the immunity of the valid governmental

action doctrine is extended to the activities and contracts of private parties with government agencies, a very significant portion of our economy and a large number of its participants will be excluded from the protection of the antitrust laws, which will obstruct the achievement of the goal of the antitrust laws of a free and unfettered economy.

I. The Restrictive Covenant in the Redskins' Lease is not the Product of Valid Governmental Action and Therefore Should not be Immune From the Antitrust Laws.

The suggested rule composed by the appellees, "that where direct governmental action, as distinct from private conduct, has caused the alleged injury to a plaintiff, the provisions of the antitrust laws are inapplicable, both as to the government agency involved and as to the private party contracting with that agency" (Brief, p. 25), is neither supported by decisions of the Supreme Court nor applicable to the facts of this case.

The restrictive covenant, prohibiting the Armory Board from leasing the stadium to any other professional football team for a period of thirty years until 1990, is not the product of direct unilateral government action, but rather the product of a year and a half of difficult arms-length negotiations. During the bargaining sessions, the Redskins demanded as a condition of the lease the exclusive use of the stadium. (Corporation Council's Memorandum to Armory Board, App. 69).

The appellees contort the facts when they argue that "the Armory Board determined that it could best serve the Stadium's interests and the interests of the public by entering into a long-term, exclusive lease agreement with the Redskins" (Brief, p. 19), and that although the restrictive covenant was desired by the Redskins, "the Armory Board voluntarily agreed to its inclusion" (Brief, p. 4). The facts are that the restrictive covenant was the product of the Redskins bargaining power. Congress and the Armory Board

were of the opinion that a long-term lease with the Redskins was essential for the stadium to generate sufficient income to finance its construction and maintenance. The fact that a long term lease with the Redskins was considered essential, increased the bargaining power of the Redskins with which to press their demand that the stadium not be used by another professional football team. Implicit in the appellees' argument that a long-term lease with the Redskins was necessary is that the restrictive covenant was exchanged for a long-term lease, i.e., the Armory Board was forced to grant exclusivity. The Redskins should not be permitted to exploit the financial concern of Congress and the Armory Board to obtain a restrictive covenant that excludes competitors and maintains their private monopoly merely because the Armory Board, and not a private party, is a party to the lease.

No Court decisions or dicta extends the immunity of the valid governmental action doctrine to contracts of private parties with government agencies that foreclose competitors and maintain a private monopoly. The only case dealing with circumstances similar to those of the present case is *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.* 424 F.2d 25 (1970), discussed by appellants in their main brief at pages 26 and 27. In *Paddock* a swimming pool contractor persuaded government agencies to adopt the contractor's specifications designed to prevent other contractors from obtaining pool contracts. The Court held that activities of the contractor were not immune from the antitrust laws merely because the government entity had adopted the contractor's specifications. The Court specifically pointed out the limitations of the *Parker*,¹ *Noerr*² and *Pennington*³ decisions in advancing the view that commercial dealings between private parties and government entities are not immune from the antitrust laws solely because a govern-

¹317 U.S. 341 (1943)

²365 U.S. 127 (1965)

³381 U.S. 657 (1965)

ment entity is a party. See also *Marine Space Enclosures, Inc. v. Federal Maritime Commission*, ____ U.S. App. ____, 420 F.2d 577 (D.C. Cir. 1969) and *National Aviation Trades Association v. Civil Aeronautics Board*, ____ U.S. App. ____, 420 F.2d 209 (1969), two regulatory agency cases discussed in appellants' main brief at pages 27 and 28, in which this Court recognized that a contract between a private party and a government agency for the use of public property should not be immune from the fundamental policies and restrictions of the antitrust laws merely because a government entity is a party to the contract.

Contrary to the rule composed by the appellees, the Supreme Court has never held or indicated that all private parties dealing with the government are immuned from the antitrust laws. The Supreme Court in *Continental Ore Company v. Union Carbide & Carbon Corp.* 370 U.S. 690 (1961) refused to extend immunity from the antitrust laws to a company acting as a government purchasing agent that was not specifically authorized to engage in activities that violated the antitrust laws. In *Pennington*, the Court was careful to distinguish *Continental Ore* by stating that the judgment against the defendants was affirmed since "there was no indication that the Comptroller or any other official within the Canadian government approved or would have approved of joint efforts to monopolize the production and sale of vanadium . . ." ⁴

In the present case there is no provision in the Stadium Act that specifically exempts the acts of the Armory Board from the restrictions of the antitrust laws. The Supreme Court strongly indicated in *Parker v. Brown*, 317 U.S. 341 (1943) and the First Circuit indicated in *Paddock* that where government entities have not been authorized by the legislature to violate the antitrust laws the activities and contracts of private parties dealing with government entities are not immuned from the restrictions of the Sherman Act.

⁴381 U.S. at 671 n. 4.

II. Issue of Interpretation of Provisions of District of Columbia Stadium Act not Properly Before This Court.

The issue of the interpretation of certain provisions of the Stadium Act, attempted to be raised by the appellees in their brief, is not properly before this Court because the appellees did not file a cross appeal. Interpretation of certain provisions of the Stadium Act was one of the legal issues considered by the District Court which it found to be either "inappropriate for consideration on motions for summary judgment" or "without merit."⁵

The established rule in this Circuit is that if a prevailing party wishes to rely on appeal on a contention decided against him, he must preserve his rights by appeal. An appeal brings up for review only that which was decided adversely to the appellants. *Tallman v. Udall*, 116 U.S. App. D.C. 379, 385, 324 F.2d 411, 417 (D.C. Cir. 1963) and *Wisconsin Bankers Association v. Robertson*, 111 U.S. App. D.C. 85, 86, 294 F.2d 714, 715 (D.C. Cir. 1961).

In *Wisconsin Bankers* the parties agree that the District Court should first determine two legal issues that if decided against the bankers would make trial unnecessary. The District Court held that the bankers had standing to sue but that the challenged regulations were authorized and legal and therefore dismiss the complaint. On appeal by the bankers, this Court held that the appellees could not raise the issue of the bankers standing to sue because a cross appeal had not been filed. Judge Miller, in writing the opinion of the Court stated:

"This appeal by the Wisconsin Banks and Bankers brings before us only the holding that the regulations and charter provisions are valid for 'An appeal brings up for review only that which was decided adversely to appellants'. *Loudon v. Taxing District*, 1881, 104 U.S. 771, 774, 26 L. Ed. 923. As a cross appeal

⁵ App. 34.

was not filed by the appellees, we cannot consider, and therefore express no opinion concerning, their argument that the District Court erred in holding the appellants had standing to sue. In the absence of a cross appeal, an appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . . *United States v. American Ry. Exp. Co.*, 1924, 265 U.S. 425, 435, 44 S. Ct. 560, 564, 68 L. Ed. 1087."

The defense of the statutory provisions of the Stadium Act, which are subject to interpretation, is not jurisdictional and it may be waived at any time. By failing to appeal from the adverse determination of the District Court, the appellees in effect waived their defense founded upon the statute and can not now attack that part of the District Court decision with which they disagree. *Tallman v. Udall*, *supra*, at 386.

III. The Provisions of the District of Columbia Stadium Act do not Exempt the Redskins' Lease From Application of the Antitrust Laws.

The Redskins argue that the clause in the Stadium Act "without regard to any other provision of law" exempts the Armory Board's actions from the antitrust laws and thereby provides antitrust immunity to the restrictive covenant in the Redskins' lease.

It can not be emphasized too strongly that the Supreme Court disfavors repeal of the antitrust laws by implication. *United States v. First City National Bank*, 386 U.S. 361, 368 (1967); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 221, 350-51 (1963); *California v. F.P.C.*, 369 U.S. 482, 485 (1962).

There is no provision in the Stadium Act that specifically exempts the activities of the Armory Board from the anti-

trust laws nor the activities of the persons with whom the Armory Board deals. There exists no apparent need to exempt the Armory Board's leasing activities from the antitrust laws in order to permit the Armory Board to properly manage the stadium. When Congress has desired to grant antitrust immunity to certain federal agency activities, it has specifically done so in clear unambiguous language. See Federal Aviation Act 49 U.S.C. Section 1384; The Shipping Act 46 U.S.C. Section 814; and Agricultural Marketing Agreement Act of 1937, 7 U.S.C. Section 607 at seq.

There exists a long line of cases which hold that the activities of business entities are not immune from the provisions of the antitrust laws solely because their activities were approved by a government agency which has been vested with full statutory authority to regulate that particular industry. e.g., *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), in which the Court held that F.P.C. approval of a utility merger does not immunize it from the antitrust-merger provisions of Section 7 of the Clayton Acts; *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964), in which the Court held that bank mergers approved by the Comptroller of the currency may nevertheless be prohibited by Section 1 of the Sherman Act; and *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), in which the Court held the S.E.C. regulation of stock exchanges does not result in complete exemption from the antitrust laws in ruling that the antitrust laws are applicable even though the Securities Exchange Act gave the Exchange the general power to adopt rules governing its members.

The Supreme Court has strictly construed the scope of statutory exemptions and it has repeatedly declined to hold that statutes are designed to displace the antitrust laws, unless there is an unequivocally declared congressional purpose to do so, e.g., *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 304-05 (1963), in which the Court held that the broad C.A.B. jurisdiction over unfair air trade practices does not prevent antitrust suits; *California v.*

F.P.C., 369 U.S. 482, 485 (1962), in which the Court held that the Federal Communications Act held no bar to anti-trust suits against TV radio licensees; and *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) in which the Court held that the Interstate Commerce Act does not immunize railroads from prosecution for unfair rate fixing.

When the Supreme Court has been faced with the reconciliation of two statutes with regard to the application of the antitrust laws, it has specifically expressed and followed the policy that when there are two Acts upon the same subject, the rule is to give effect to both if possible and that repeal of the antitrust laws is to be regarded as implied only if necessary to make the provisions of the Act work. *Silver v. New York Stock Exchange*, *supra*, 357-358, *California v. F.P.C.*, *supra*, 485, and *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

The Redskins cite cases that establish the legal principal that words used in a statute should be given their plain and usual meaning unless such meaning would lead to "absurd or futile results." They then proceed to base their interpretation of the pertinent clause of the Stadium Act on an argument founded upon the premise that the language of the Act authorizes the Armory Board to disregard and violate all the laws of the United States and of the District of Columbia when managing and operating the stadium. This interpretation of the language of the Act would produce the absurd results condemned by the Court decisions cited by appellees.

For example, the interpretation of the appellees would permit the Armory Board to lease the stadium to a tenant for use as a gambling arcade during summer nights when baseball was not being played at the stadium. This use of the stadium would violate the federal law prohibiting the operation of gambling devices in the District of Columbia. 15 U.S.C. Sec 1175. The legislative history of the Act does not reveal any intention on the part of Congress to give the Armory Board such a broad exemption from all the laws of the United States and the District of Columbia.

A more reasonable interpretation of the language, . . . "The Board is hereby authorized without regard to any other provision of law . . ." would be that no other law is to limit the authority granted to the Armory Board by the Stadium Act to do those things enumerated in the eleven subparagraphs of Section 2-1723 (App. 71) in the course of its management and operation of the stadium. It should be noted that the pertinent clause modifies the word "authorized."

For example, the authority of the Armory Board to enter into lease agreements for the use of the stadium is not to be restricted by the competitive bidding law, 41 U.S.C. § 5, or the Federal Procurement Regulations. In other words, the Armory Board does not have to look to any other statute for its authority to do what it deems is necessary to properly manage and operate the stadium, and it may exercise its own discretion in negotiating contracts and leases as a private party free of government procurement laws and regulations.

The interpretation of the joint venturers is supported by the statement made by Senator Bible, Chairman of the District of Columbia Committee, when he was reporting to the Senate on an amendment to subparagraph (6) of Section 2-1723. Senator Bible said:

"The Committee felt that, inasmuch as the stadium is to be in the *nature of a private venture*, it was more desirable that the Board be *vested with the authority to make its own decisions* as to the letting of concessions, without placing restrictions on the Armory Board." (emphasis supplied) 103 Cong. Rec. 13567.

Although Senator Bible was making the above quoted statement in support of a specific amendment, it clearly indicates that Congress intended to provide the Armory Board with sufficient authority to operate the stadium as a "private venture" and not as a government entity with the authority to violate the laws of the United States and

District of Columbia. There is nothing in the legislative history that suggests Congress intended to give the Armory Board the authority to exercise its discretion without regard to the laws of the federal government or the District of Columbia.

The most reasonable interpretation of the pertinent language is that the authority of the Armory Board is derived solely from the Stadium Act and not from any other laws, and that no other law is to affect the authority of the Armory Board to engage in any lawful acts necessary to construct, manage and operate the stadium, including entering into leases and contracts for lawful purposes under lawful terms and conditions. This interpretation would permit the Court to give effect to both the cited language of the Stadium Act and the antitrust laws.

The members of the Armory Board themselves do not operate under the misgiving that they do not have to abide by any of the laws of the United States or the District of Columbia. Mr. Francis Kane, Chairman of the Armory Board, in his deposition, testified that the Armory Board must operate the stadium in accordance with police, fire and health regulations of the District of Columbia. (Kane Dep. at 16, 17). He stated that he did not know of any thing the Armory Board has violated knowingly. Mr. Arthur Bergman, Manager of the Armory Board, in his deposition stated that the Armory Board is involved in complying with all D.C. regulations and that the Armory Board would absolutely not permit a violation of either the federal or District of Columbia laws. (Bergman Dep. 27-33).

In addition to the testimony of the Chairman and Manager of the Armory Board, Paragraph IV(d) of the Redskins' lease is additional evidence that the Armory Board realizes it does not have the authority nor would it be proper for it to lease the stadium to tenants who were violating the "statutes, laws, ordinance, rules, orders and regulations of the Congress of the United States, of the Federal govern-

ment and of the District of Columbia.”⁶ The cited paragraph of the lease provides for free access to the stadium at all times by members, employees and agents of the Armory Board, District of Columbia and the Federal government, as are necessary to insure compliance by the Redskins with all statutes, etc. of the federal government and District of Columbia. This provision clearly shows, that although the Armory Board permitted the Redskins to obtain a restrictive covenant that restrains the business of professional football in the District of Columbia in violation of the antitrust laws, the Armory Board is not operating under the illusion that it has the authority to permit such a violation of federal law.

CONCLUSION

The order of the District Court granting the defendants’ motion for summary judgment on Counts I, II and III of the second amended complaint, on the grounds that the restrictive covenant in the Redskins’ lease is immune from the antitrust laws, should be reversed and the case should be remanded to the District Court for trial.

Respectfully submitted,

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October 29, 1970

⁶ App. 51.